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Supreme Court, U.S.
FILED

95 1381 FEB 26 1996

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1995

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THE VILLAGE OF AIRMONT, and its Municipal Officers,
Petitioners,

-against-

RABBI YITZCHOK LEBLANC-STERNBERG, CHANIE LEBLANC-STERNBERG, FRED WALFISH, LEWIS KAMMAN, PARK AVENUE SYNAGOGUE, INC., UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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80 pp

QUESTIONS PRESENTED

Did the Court below improperly and unconstitutionally (1) require a facially neutral zoning ordinance to be applied so as to accommodate religious worship practices; and (2) decide a case where the Plaintiffs have suffered no injury and can identify no immediately impending injury under the Fair Housing Act?

PARTIES

The parties are fully stated in the caption of this case.

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In The

SUPREME COURT OF THE UNITED STATES
October Term, 1995

THE VILLAGE OF AIRMONT, and its Municipal Officials,

Petitioners,

-against-

RABBI YITZCHOK LEBLANC-STERNBERG, CHANIE
LEBLANC-STERNBERG, FRED WALFISH, LEWIS
KAMMAN PARK AVENUE SYNAGOGUE, INC.
UNITED STATES OF AMERICA,

Respondents

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Judgment of the Court of Appeals for the Second Circuit was rendered with opinion on September 21, 1995. The Opinion accompanying the Judgment is set forth in Appendix A. A Judgment of the Court of Appeals denying the Petition for Re-Hearing was rendered on November 28, 1995.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Petitioners are the municipal entity known as the Village of Airmont ("Village") and its municipal officers. The Village was incorporated in April 1991. In January 1993 the Village adopted a zoning code regulating *inter alia* location of places of religious worship. The zoning code was facially neutral and provided for places of worship in residential areas provided a two acre minimum lot size existed. Individual Respondents are

Orthodox Jewish residents of this Village who require a place of worship within walking distance of their residences. Prior to Village incorporation, certain Orthodox Jewish residents filed litigation alleging *inter alia* a violation of the Fair Housing Act and Free Exercise Clause of the First Amendment. In December 1991 the United States of America ("Government") commenced an action against Petitioners under the Fair Housing Act. Both litigations claim the Village's zoning code restrictions on places of worship violated the Fair Housing Act and Free Establishment Clause.

After a trial of nearly two months, the jury dismissed all Respondents claims except a claim against the Village. The jury found the Village violated individual Respondents rights under the Fair Housing Act and the Village conspired to violate the Respondents rights under the First Amendment. The jury awarded zero damages. After the jury verdict, the District Court below dismissed the Government's action and later granted the Village's application for a Judgment as a matter of law dismissing all Respondents claim.

Respondents timely appealed to the Court of Appeals for the Second Circuit. The matter was orally argued January 12, 1995 and decided September 21, 1995. A timely Petition for Re-Hearing was submitted to the Second Circuit Court of Appeals and by Judgment dated November 28, 1995 the Petition was denied. Petitioners appeal for a Writ of Certiorari to this Court. The Docket Numbers below were 94-7103, 94-6125 and 94-6048.

Jurisdiction of the Court of Appeals for the Second Circuit pursuant to 28 U.S.C. 1295 (a)(4)(6)(10) and for this Court is 28 U.S.C. Section 1254 (1).

STATEMENT OF THE CASE

Procedures which lead to this Petition have been summarized in a statement of grounds on which jurisdiction is being sought. In the early 1980's a movement took place for local governmental determination from which several new villages were formed. The Village movement occurred within the Town of Ramapo, State of New York. In all of these village movements, a primary focus of village incorporation involved establishing local zoning ordinances. Prior to incorporation of the Village of Airmont ("Village"), the Town of Ramapo within which the Village was located had interpreted a long standing zoning concept of "home professional office" to accommodate Orthodox Jewish residents who needed a place of worship in a residential neighborhood. The Town's own zoning official conceded this "interpretation" was "relatively unique" in the entire United States. The home professional office was utilized since certain Orthodox Jewish sects did not have funds to purchase a traditionally sized place of worship.

Orthodox Jewish residents are required to walk to religious services on the Sabbath. The Village's zoning ordinance permitted places of worship even in residential districts provided a minimum two acre lot existed. Although the Village's facially neutral zoning ordinance permitted a place of worship within walking distance from residential lots owned by Orthodox Jewish residents, the Respondent Orthodox Rabbi testified that "economics" prevented purchase of a two acre size lot for a place of worship. Moreover, the Village's zoning code had not yet been interpreted to allow for a place of worship under the "home professional office" zoning classification as did the Town of Ramapo zoning code.

The record regarding the Village's zoning code as applied demonstrated that no Orthodox Jewish residents were prevented from residing within the Village. Likewise, no Orthodox Jewish residents were required to relocate from the Village as a result of its zoning ordinances. In fact, the number of Orthodox Jewish residents in the Village increased dramatically since municipal incorporation and adoption of the Village's zoning ordinance. Furthermore, Orthodox Jewish residents located themselves within a very large residential area where even the Government conceded that all houses in the neighborhood were "occupied by Orthodox Jews." Additionally, all of the individual Respondents who practiced the Orthodox Jewish faith conceded that the Village did not violate *any* rights to religious worship.

Within the Village, the residential area occupied by individual Respondents was referred to as a "Torah Community" and was developed by a builder who previously developed "an exclusively Orthodox community." The Second Circuit Court of Appeals, however, supported the practice of segregated religious neighborhoods and required the Village's zoning code to accommodate religious worship where such zoning code was otherwise facially neutral in establishing places of worship within different zoning districts.

Notwithstanding the fact that *no* Respondents who practiced the Orthodox Jewish faith were prevented from attending prayer service or religious worship and *no* Orthodox Jewish resident claimed to be harmed by the Village zoning ordinance, the Court of Appeals reversed the District Court's dismissal of the Government case. The Circuit Court also reversed the District Court's ultimate dismissal of the individual Respondents claims under the Fair Housing Act and First Amendment.

I.

A DEEP DIVISION IN THE CIRCUITS ON THE ISSUE WARRANTS THIS PETITION BEING GRANTED

This determination by the Second Circuit provides the proverbial open sesame to overturning local zoning codes and is in conflict with decisions on this issue in other circuits.

Beginning in *Lakewood v. City of Lakewood*, 699 F.2d 303 (6th Cir.) (cert. denied, 464 U.S. 815 (1983)) a clear respect for local zoning powers in First Amendment cases was undertaken by Appellate Courts. In *Lakewood* the Sixth Circuit considered a complete municipal zoning ordinance prohibition in all residential zoning districts for religious places of worship. (Id. at 303-304). The Sixth Circuit observed that the effect of such zoning ordinances as applied to places of worship "are an indirect financial burden" on religious practices. (Id. at 307). The Sixth Circuit later remarked "the burdens of the ordinance are the increase cost of purchasing land . . . ." (Id.). Thus, an increased financial burden to practice religion as a result of zoning ordinances was found to be constitutional by the Sixth Circuit.

Contrary to the holding by the Second Circuit, in *Lakewood* the Sixth Circuit expressly noted:

> The Lakewood ordinance "simply regulates a secular activity and, as applied to the appellants

> operates so as to make the practice of their religious beliefs more expensive." (363 U.S. at 605, 81 S.Ct. at 1146) (Emphasis added). It does not pressure the Congregation to abandoned its religious beliefs through financial or criminal penalties. Neither does the ordinance tax the Congregation's exercise of its religion. Despite the ordinance's financial and aesthetical imposition on the Congregation, we hold that the Congregation's freedom of religion, as protected by the Free Exercise Clause has not been infringed. (Id. at 307-308). (Citing *Braunfield v. Brown*, 366 U.S. 599 (1961)).

Accordingly, the Sixth Circuit in *Lakewood* clearly followed established Supreme Court precedent under *Braunfield* rejecting a free exercise claim where only financial hardship in religious practices would result by a zoning ordinance. This *Lakewood* Court unlike the Second Circuit herein did not require any accommodation for religious worship due to financial constraints from a zoning ordinance.

In accord with the Sixth Circuit ruling in *Lakewood*, the Eleventh Circuit in *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983) (cert. denied, 469 U.S. 827 (1984)) expressly determined a case on nearly identical facts as the Second Circuit ruled in the case at bar. In *Grosz*, the Circuit Court remarked this case "calls for the accommodation of two important values, both embodied in the spirit and letter of the Constitution: Free exercise of religion and the effective use by a state of its police powers. (Id. at 730-731). Identical to the facts in the *Airmont* litigation, *Grosz* concerned an Orthodox Jewish Rabbi who converted a garage area to a place of worship. The local zoning code in *Grosz* prohibited places of worship in single family residential zones. Prior to Rabbi Grosz establishing this place of worship, Orthodox Jewish services were conducted in various homes in the neighborhood. The municipality's zoning ordinance permitted places of worship to operate in other zoning districts than single family residential districts.

The Circuit Court in *Grosz* determined that "well attended services have disturbed neighbors as a result of persons seeking directions to the Grosz schul, as a result of chanting and singing during the services, and as a result of occasional large congregations of worshippers at the property." (Id. at 732). Contrary to the determination by the Second Circuit herein, in *Grosz* the Eleventh Circuit upheld the zoning ordinance despite the detrimental impact upon the congregation "in terms of convenience, dollars or aesthetics." (Id. at 739). This determination by the Eleventh Circuit was in accord with former Supreme Court Justice Vinson's writing in *American Communications Ass'n v. Douds*, 339 U.S. 382, 397 (1950) that dismissed a free exercise claim by a religious group contending "its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas." (Id. at 740).

In direct conflict with the Sixth and Eleventh Circuit holdings on this issue, the Fifth Circuit in *Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988) decided a zoning ordinance that prohibited a place of worship in residential districts. That Circuit declared the zoning ordinance to be in violation of the Free Exercise Clause:

> Laws that make churches, synagogues, and mosques accessible only to those affluent enough to travel by private automobile obviously burden the exercise of religion by the poor . . . . (Id. at 299).

The Court in *Islamic Center* expressly noted the *Lakewood* and *Grosz* decisions, but did not follow the holdings in those circuit rulings instead declaring, "The burden placed on relatively impecunious Muslim students by the [the municipal zoning] ordinance" was unconstitutional. (Id.). What this division in the Circuit Courts demonstrates is the difference in what steps a municipality must make in its zoning laws to accommodate religious worship. For example, both *Lakewood* and *Grosz* clearly indicate no accommodation is necessary and the holding in *Islamic Center* and the Second Circuit herein mandates some type of accommodation by the municipality. The Second Circuit in the case at bar cited Justice Souters concurring opinion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, ____ U.S. ____, 113 S.Ct. 2217 (1993). (*Sternberg v. Chirkis, et al.*, (A. 28). In *Lukumi Babalu Aye* a concurring opinion by Justice Souter advanced the concept of "substantive neutrality that, in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws." (Id. at 2241). That concurring opinion in *Lukumi Babaluaye* was a direct challenge to the United States Supreme Court holding in *Employment Division v. Smith*, 494 U.S. 872 (1990) which announced the rule that a "neutral, generally applicably" law does not run afoul of the Free

Exercise Clause even when it prohibits religious exercise in effect. As Justice Souter noted about the *Smith* decision, "The four Justices who rejected the *Smith* rule, by contrast, read the Free Exercise Clause as embracing what I have termed substantive neutrality." (Id. at 2242).

The Second Circuit decision in the case at bar directing that relief be fashioned to effectively accommodate religious worship by Respondents is a total embrace of the four Justice dissenting opinion in *Smith* as well as the concurring opinion by Justice Souter in *Lukumi Babalu Aye*. Based upon this clear deviation from established precedent as well as the deep division in the Circuits regarding zoning laws and religious worship, it is respectfully submitted that certiorari should be granted herein.

II.

THE COURT SHOULD TAKE CERTIORARI TO DETERMINE WHEN AN AGGRIEVED INDIVIDUAL MAY BRING SUIT UNDER THE FAIR HOUSING ACT

In reversing the District Court, the Second Circuit pronounced, under the Fair Housing Act, "[A] person who is likely to suffer [an injury as defined in the Fair Housing Act] need not wait until a discriminatory effect has been felt before bringing suit." 67 F.3d 412, 425 (2nd Cir. 1995). Indeed, under the facts most favorable to Respondents, the Second Circuit recognized "[B]ecause no applications had been made [for home synagogues] under the [Village of] Airmont [zoning] code, the Plaintiffs *had not suffered an injury for which the jury wished to award damages*." 67 F.3d at 429. In the Second Circuit opinion Respondents not only failed to identify *past* harm from the Village's new and untested zoning code, Respondents failed to identify *future* harm with any sense of imminence or immediacy.

The Second Circuit said its generous, sue-before-you-can-identify-harm-on-the-horizon rule springs, from the Fair Housing Act's definition of "aggrieved person":

> any person who --
>
> (1) claims to have been injured by a discriminatory housing practice; or
>
> (2) *believes that such person will be injured by a discriminatory housing practice that is about to occur.*

(Emphasis added). 42 U.S.C. § 3602(i).[1]

Certiorari is warranted: (a) because this Court has never construed the words "believes" and "is about to occur" in subsection (2), underscored; (b) because the Second Circuit's overly broad reading of an "aggrieved person" in the absence of Supreme Court guidance, collides with Art. III of the Constitution and this Court's prudential limitations on ripeness; and (c) because the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*, has increasingly been used to attack local zoning and building codes, Supreme Court guidance on the fundamental question of when such actions may be brought is desperately needed.

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[1] The Second Circuit decision reversed judgment as a matter of law against plaintiffs on civil rights conspiracy claim as well as on a Fair Housing Act claim. That court made no ripeness analysis whatsoever with respect to the conspiracy claim. Should the Court take certiorari, the Village of Airmont intends to argue that the entire case was unripe.

This Court has resolved the "standing" question of *who* may be a Fair Housing Act Plaintiff. (*See Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972)(tenants of housing complex charged with discrimination may sue); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 60 L.Ed.2d 66, 99 S.Ct. 1601 (1979)(village and its residents adversely affected by "steering" may bring suit as indirect victims of discrimination); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 455 U.S. 363, 71 L.Ed.2d 214 (1982)("testers," without actual intention to buy or rent, may bring suit for discriminatory selling practices). Significantly, however, this Court has never resolved the question of *when* a bona fide Plaintiff may sue under the Fair Housing Act. The Supreme Court has never defined the limits, either under Constitutional or prudential considerations, on the Fair Housing Act's utilization by one who "believes" they "will be" injured by a discriminatory housing practice that "is about to occur." It is important on a national scale for this Court to define such elastic terms, lest a Defendant like the Village of Airmont be dragged into expensive litigation before a wrong exists.

Just last term, in *Adarand Constructors, Inc. v. Pena*, ___U.S.___, ___, 115 S.Ct. 2097, 2105, 132 L.Ed.2d 158 (1995), a case not arising under the Fair Housing Act, the Court reaffirmed the principle enunciated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565, n. 2, 112 S.Ct. 2130, 2138-9, 119 L.Ed.2d 351 (1992) that a justiciable injury must be either actual or imminent. In *Lujan*, this Court instructed, "Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to insure that the alleged injury is not too speculative for Article III purposes -- that the injury is '*certainly* impending.'" 504 U.S. at 565, n.2, 112 S.Ct. at 2139, n.2, 132 L.Ed.2d 158. Likewise in *Whitemore v. Arkansas*, 495 U.S. 149, 159, 110 S.Ct. 1717, 1724, 109 L.Ed. 135 (1990), this Court also held, "Allegations of possible future injury do not satisfy the requirements of Art. III." *See also Ex parte Levitt*, 302 U.S. 633, 634, 58 S.Ct. 1, 82 L.Ed. 493 (1937)(It is "established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action. . . .")(*cited in Laird v. Tatum*, 408 U.S. 1, 13, 92 S.Ct. 2318, 2325, 33 L.Ed.2d 154 (1972).

The very amorphous definition of "aggrieved person" found in the 42 U.S.C. § 3602(i)(2) is devoid of any temporal component or test of immediacy of harm. Without judicial reigns, as in the case at bar, this definition collides with this Court's past pronouncements on ripeness. As such important jurisprudential concepts in the Fair Housing Act require this Court's attention.

The instant case demonstrates how, bereft of guidance by this Court, lower courts can enlarge the definition of an aggrieved person under the Fair Housing Act from what should be its moorings under Art. III of the Constitution and prudential considerations this Court has articulated. Indeed, here the Second Circuit found ripeness under the "aggrieved person" definition despite the following uncontradicted facts: (1) before the Village of Airmont was incorporated, the Town of Ramapo "adopted an interpretation of its [zoning] Code's ['home professional office'] provision that permitted 'home synagogues,' by allowing rabbis to conduct worship services within their homes for groups not exceeding 49 individuals," 67 F.3d at 418; (2) the individual Respondents obtained approval under the Ramapo Zoning Code for a "home professional office" synagogue and continued to operate that synagogue without interruption once the Village of Airmont was incorporated; (3) because it was approved by the Town of Ramapo before Airmont was incorporated, individual Respondents' approval was "grandfathered," and their home synagogue could (and would) continue operating under authority from the Town of Ramapo regardless of what any subsequent Village of Airmont zoning code would provide;[2] (4) in 1993 the Village of Airmont passed a zoning code with a provision allowing for home professional offices that is "basically similar" to that contained in the Ramapo Code, save a couple of "minor changes," *see U.S. v. Village of Airmont*, 839 F.Supp. 1054, 1061 (S.D.N.Y. 1993); and (5) by the time of trial, there had been no applications under the Village of Airmont zoning code for home synagogues, and its ambiguous provision relating to home professional offices had not been interpreted either by the

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[2] District Judge Goettel noted of the Airmont Zoning Code:

> ...*it can have no impact on these plaintiffs*, who have already gotten their zoning permission and who would be, at worst, a non-conforming use under the new zoning law.

(Emphasis added). 846 F.Supp. 294, 296 (S.D.N.Y. 1994).

Airmont Zoning Board of Appeals[3] or by a court.

At trial, there was no evidence presented of any prospective home synagogue applicant under the Airmont zoning code that could have an application denied and the Second Circuit opinion identified none. Indeed, there was no indication that an unknown future application for home synagogue would be denied by the current Petitioners or future Petitioners. *Cf. Renne v. Geary*, 501 U.S. 312, 323, 111 S.Ct. 2331, 2340, 115 L.Ed.2d 288 (1991)("'Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.'")(quoting *Longshoremen's Union v. Boyd*, 347 U.S. 222, 224, 74 S.Ct. 447, 448, 98 L.Ed. 650 (1954)). Therefore, this case presented no case or controversy for determination by a Federal Court. (*Village of*

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[3] Under § 7-712-b of the New York Village Law (McKinney's 1995), the Zoning Board of Appeals (hereinafter "ZBA") is the ultimate municipal arbiter regarding, *inter alia*, "interpretations" or "determinations" under the village zoning code. There was no evidence adduced at trial, and none correctly recited in the Second Circuit's opinion, as to what the ZBA selection process entailed, and what views, if any, the newly-appointed ZBA members held with regard to the interpretation of the "home professional office" provision of the Airmont Zoning Code insofar as it related to home synagogues or Orthodox Jews. The Second Circuit did point to the appointment of James Montone, an anti-synagogue activist, to the Planning Board, 67 F.3d 412, 421, but that body had no power to issue final interpretations of the Airmont Zoning Code on the home professional office provision, and, thus, had no power to affect plaintiffs in their present or future practice of their religion.

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 503-4, 102 S.Ct. 1186, 1196, 71 L.Ed.2d 362 (1982)("We do not suggest that the risk of discriminatory enforcement is insignificant here. . . . Nor do we assume that the village will take no further steps to minimize the dangers of arbitrary enforcement. . . . 'Although it is possible that specific future applications ... may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise.'"). The bizarre result here, where a Court of Appeals reverses a District Court's judgment as a matter of law even though it admits that Respondents "*had not suffered an injury for which the jury wished to award damages*," (emphasis added) 67 F.3d at 429, because Respondents might be harmed at some indefinite point in the future, warrants Supreme Court intervention. Granting this Petition is essential for the sake of the litigants here and the many others who are now uncertain about when a Fair Housing Act claim ripens. Otherwise stated, without this Court's construction of the question presented, municipalities can be coerced into settling unripe discrimination claims or litigating such unripe claims.

The requirement that factual scenarios be deemed ripe before federal courts intervene is grounded in the "cases" and "controversies" verbiage of Art. III of the U.S. Constitution. (See *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 297, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979); *Ellis v. Dyson*, 421 U.S. 426, 434, 95 S.Ct. 1691, 1696, 44 L.Ed.2d 274 (1975); *Steffel v. Thompson*, 415 U.S. 452, 458, 94 S.Ct. 1209, 1215, 39 L.Ed.2d 505 (1974)) as well as in prudential policy principles extending beyond the minimum requirements of Article III. *See* Wright, Miller & Cooper, *Federal Practice and Procedure* § 3521.1 (2nd Ed. 1984). *See generally* Nichol, *Ripeness and the Constitution*, 54 Univ. of Chicago L. Rev. 153 (1987)(exploring other sources of the doctrine).

Ripeness is so intertwined with jurisdiction and is so important that it may be considered by an appellate court *sua sponte*. (*Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265, n. 13, 111 S.Ct. 2298, 2306, n. 13, 115 L.Ed.2d 236 (1991)). In the seminal case on ripeness, this Court explained:

> The basic rationale of the ripeness doctrine 'is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements...

Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

One commentator has noted among the central precepts supporting this ripeness doctrine is that Petitioners "should not be forced to bear the burdens of litigation without substantial justification, and in any event may find themselves unable to litigate intelligently if they are forced to grapple with hypothetical possibilities rather than immediate facts." Wright, Miller & Cooper, *Federal Practice and Procedure* § 2532.1 (2nd Ed. 1984).

Particularly apt in Fair Housing Act challenges to new, uninterpreted zoning code provisions is the observation, "The central concern is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." Wright, Miller & Cooper, *Federal Practice and Procedure* § 3532 (1995 Suppl.)(citing *Lewis v. Continental_Bank Corp*., 494 U.S. 472, 480-81, 110 S.Ct. 1249, 1255, 108 L.Ed.2d 400 (1990), *Thomas v. Union Carbide Agricultural Prods. Co*., 473 U.S. 568, 580, 105 S.Ct. 3325, 3333, 87 L.Ed.2d 409 (1985)).

The case at bar presents many important public law issues, not least of which is when can a Fair Housing Act claim be brought? The Fair Housing Act has become a potent weapon to challenge a variety of zoning and land use decisions. Insertion in 1988 of prohibitions on discrimination against individuals on the basis of handicap and familial status has sparked a wave of litigation. Just last term, this Court examined the ramifications of these amendments. *See City of Edmonds v. Oxford House, Inc.*, ___ U.S.___, 115 S.Ct. 1776, ___L.Ed.2d___ (1995). Guidance is required on when such claims ripen to merit federal court attention so that the plethora of villages, towns, cities, planning boards, zoning boards, potentially aggrieved individuals, and the growing number of advocacy groups ready to litigate can gain some measure of certainty as to when litigation is properly in the offing. Certainty about when conduct risks and does not risk litigation would serve to reduce litigation as people could adjust their conduct accordingly.[4] This Court can provide such certainty.

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[4] Typical of the type of claims now appearing in federal courts across the nation is *Oxford House, Inc, v. City of Virginia Beach, VA.*, 825 F.Supp. 1251, 1260, 1262 (E.D. Va. 1993). There, Plaintiffs sought to open group homes for recovering alcoholics and drug abusers in areas zoned for single family dwellings. The City's

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zoning ordinance permits group homes to operate in any of the City's ten residential districts only if they obtain a conditional use permit. Plaintiff began construction without the conditional use permit, received a notice of violation, and sued. The court dismissed the action as unripe because:

> The zoning scheme will not be conclusively 'applied' to Plaintiffs, and have no final 'effect' on them (discriminatory or otherwise), until they request a conditional use permit and afford the City an opportunity to act on their requests. Simply stated, because Plaintiffs may be granted a conditional use permit if they apply for one, their discrimination claim is unripe in the most fundamental sense. . . . Once the City reaches a decision, Plaintiffs may seek judicial redress if they continue to think themselves aggrieved.

See also *Thornton v. City of Allegan*, 863 F.Supp. 504, 508 (W.D. Mich. 1993)("Plaintiff did apply for a special use permit and the ZBA's affirmance of the Council's denial of the permit was a final decision within the meaning of MICH.COMP. LAWS § 125.585(11). . . . [T]his Court therefore has jurisdiction over the subject matter.")

The Second Circuit decision in the case at bar, imposing no "wait and see" requirement, plainly conflicts with these decisions.

In *U.S. v. Village of Palatine,* Ill, 37 F.3d 1230 (7th Cir. 1994), the court dismissed as unripe a discrimination-against-the-handicapped challenge to a local ordinance that required special use permits for group homes. The Fair Housing Act prohibits "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [the handicapped] equal opportunity to enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). In a footnote, however, the court raised the following specter: "We note that if Plaintiff's claim were of discriminatory intent, rather than failure to make a reasonable accommodation, this claim *might well be* presently ripe even though Oxford House-Mallard has

IV.

CONCLUSION

It is respectfully submitted that the determination by the Second Circuit below is contrary to established precedent and deepens a division in the Circuit Courts on the question of religious worship and zoning ordinances. Also by deciding this case, the Second Circuit exceeded the requirements of Article III concerning a requisite case and controversy for judicial intervention. These issues are of great importance to the public interest and should be considered and resolved by the United States Supreme Court.

Wherefore, we pray that the Writ of Certiorari be issued so that these matters above set forth may be considered and resolved.

Dated: Nyack, New York
February 23, 1996

Respectfully submitted,

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On the Petition:
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Of Counsel

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not sought a special use approval." (Emphasis added). 37 F.3d at 1233, n. 3. Further pronouncement, under the facts of that case, would surely be dicta. But, were such an issue squarely presented to the Seventh Circuit, there would be no Supreme Court pronouncement on the issue.

CERTIFICATE OF COUNSEL

STATE OF NEW YORK)
COUNTY OF ROCKLAND)

I certify that I have examined the foregoing Petition for a Writ of Certiorari and that in my opinion it is well-founded and the cause is one in which the Petition should be granted.

DENNIS E. A. LYNCH
Counsel of Record for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 779, 780, 1018—August Term, 1994

(Argued: January 12, 1995
Decided: September 21, 1995)

Docket Nos. 94-7103, -6048, -6125

RABBI YITZCHOK LEBLANC-STERNBERG, CHANIE LEBLANC-STERNBERG, FRED WALFISH, LEWIS KAMMAN, PARK AVENUE SYNAGOGUE, INC.,

Plaintiffs-Appellants-Cross-Appellees,

—v.—

ROBERT FLETCHER, MARIANNE CUCOLO, JOHN C. LAYNE, and NICHOLAS VERTULLO, Individually and in their capacity as Trustees of the Village of Airmont, MAUREEN KENDRICK, Individually and in her capacity as Mayor of the Village of Airmont, RAYMOND KANE, PAUL BERLINER, THE AIRMONT CIVIC ASSOCIATION, THE VILLAGE OF AIRMONT, THE TOWN OF RAMAPO, and HERBERT REISMAN, Individually and in his capacity as Ramapo Town Supervisor,

Defendants,

ROBERT FLETCHER, JOHN C. LAYNE, NICHOLAS VERTULLO, MAUREEN KENDRICK, and RAYMOND

KANE, Individually, and in their capacity as Trustees of the Village of Airmont, and THE VILLAGE OF AIRMONT,

Defendants-Appellees,

ROBERT FLETCHER and NICHOLAS VERTULLO,

Defendants-Appellees-Cross-Appellants.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

—v.—

THE VILLAGE OF AIRMONT, AIRMONT CIVIC ASSOCIATION, RALPH BRACCO, in his capacity as Mayor of the Village of Airmont, JOHN C. LAYNE, RAYMOND KANE, CHARLES CALOTTA and RONALD SABO, in their capacities as trustees of the Village of Airmont,

Defendants-Appellees.

Before:

KEARSE, MCLAUGHLIN, and CABRANES,
Circuit Judges.

Appeals and cross-appeal from judgments of the United States District Court for the Southern District of New York, Gerard L. Goettel, *Judge*, dismissing claims that defendants violated, *inter alia*, the First Amendment and the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, by adopting zoning code restricting home synagogues. *See* 839 F. Supp. 1054 (1993); 846 F. Supp. 294 (1994).

Affirmed in part, reversed and remanded in part; cross-appeal dismissed as moot.

CRAIG L. PARSHALL, Fredericksburg, Virginia (Renee Wright, The Rutherford Institute, Charlottesville, Virginia, Reuben Koolyk, Randy Shaheen, Arnold & Porter, New York, New York, on the brief), *for Plaintiffs-Appellants-Cross-Appellees Rabbi Yitzchok Leblanc-Sternberg, Chanie Leblanc-Sternberg, Fred Walfish, Lewis Kamman, Park Avenue Synagogue, Inc.*

SARA L. SHUDOFSKY, Assistant United States Attorney, New York, New York (Mary Jo White, United States Attorney for the Southern District of New York, James L. Cott, Steven M. Haber, Assistant United States Attorneys, New York, New York, on the brief), *for Plaintiff-Appellant United States of America.*

DENNIS E.A. LYNCH, Nyack, New York (Dorfman, Lynch & Knoebel, Nyack, New York, on the brief), *for Defendants-Appellees Village of Airmont, Raymond Kane, Maureen Kendrick, and John C. Layne.*

EDMUND C. GRAINGER, III, White Plains, New York (McCullough, Goldberger & Staudt, White Plains, New York, on the brief), *for Defendants-Appellees-Cross-Appellants Robert Fletcher & Nicholas Vertullo.*

G. OLIVER KOPPELL, Attorney General of the State of New York, New York, New York (Sanford M. Cohen, Assistant Attorney General, New York, New York, of counsel), *filed a brief for Amicus Curiae the State of New York in support of Appellants.*

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, New York, New York (Howard W. Goldstein, Stephen E. Raynes, New York, New York, Steven M. Freeman, The Anti-Defamation League of B'nai B'rith, New York, New York, of counsel), *filed a brief for Amicus Curiae Anti-Defamation League of B'nai B'rith in support of Appellants.*

DAVID ZWIEBEL, MORTON M. AVIGDOR, New York, New York, *filed a brief for Amicus Curiae Agudath Israel of America in support of Appellants.*

BARBARA J. SAMEL, Albany, New York, *filed a brief for Amicus Curiae The New York State Conference of Mayors & Municipal Officials in support of Appellees.*

KEARSE, *Circuit Judge*:

These appeals from judgments entered in actions consolidated for trial in the United States District Court for the Southern District of New York, Gerard L. Goettel, *Judge*, involve claims that defendant Village of Airmont, New York ("Airmont" or the "Village"), along with individual defendants who incorporated the Village and/or served as its officers, discriminated against Orthodox Jews on the basis of their religion through the adoption of zoning policies limiting the use of Orthodox rabbis' homes for prayer services. In the action brought by the United States, the district court, as trier of fact, dismissed the government's claims under Title VIII of the Civil Rights Act of 1968 (the "Fair Housing Act," "FHA," or "the Act"), 42 U.S.C. § 3601 *et seq*. (1988), finding that the government did not establish that the Village or its officers had engaged in unlawful discrimination or that its zoning code would be interpreted in a discriminatory manner. In the other action, brought against the Village and its officers by plaintiffs Rabbi Yitzchok LeBlanc-Sternberg, Park Avenue Synagogue, Inc., and three members of that congregation under 42 U.S.C. § 1983 (1988), claiming violations of, *inter alia*, the Fair Housing Act, the First Amendment, and 42 U.S.C. § 1985(3) (1988), a jury, while finding in favor of the individual defendants, had found that the Village had violated the private plaintiffs' rights under the Fair Housing Act and conspired to violate their First Amendment rights. Thereafter, the district court, incorporating the facts and reasoning set out in its own decision dismissing the government's action, denied the private plaintiffs' claims for injunctive relief, set aside the jury's verdict in favor of the private plaintiffs against the Village, and entered judgment pursuant to Fed. R.

Civ. P. 50(b) dismissing their complaint as a matter of law.

On appeal, the government contends principally that the district court failed to apply Fair Housing Act principles and that it abused its discretion in refusing to enjoin the Village from engaging in conduct that would violate the Act. The private plaintiffs contend principally (a) that the court improperly entered judgment against them as a matter of law on their First Amendment and FHA claims against the Village in light of the jury's verdict in their favor on those claims, and (b) that because of errors in the court's instructions and evidentiary rulings, they are entitled to a new trial on their claims against the individual defendants. Robert Fletcher and Nicholas Vertullo, who were among the defendants in the private suit who received a jury verdict in their favor, cross-appeal, arguing principally that they should have been granted judgment as a matter of law at the close of the private plaintiffs' case.

For the reasons that follow, we reverse so much of the judgment entered in the private action, appealed in Nos. 94-7103 and -6125, as dismissed the private plaintiffs' claims against the Village, we affirm so much of that judgment as dismissed the private plaintiffs' claims against the individual defendants, and we dismiss the cross-appeal as moot. As to the judgment dismissing the government's action, appealed in No. 94-6048, we reverse. In both cases, we remand for further proceedings on issues as to relief.

I. BACKGROUND

Airmont is located within the Town of Ramapo, New York ("Ramapo" or the "Town"), a large area that comprises a number of incorporated villages and unincorporated sections. During the 1980s, the Town's Orthodox Jewish population, including Hasidic Jews, a subgroup of Orthodox Jewry, grew substantially. This growth was accommodated by the Town's adoption and interpretation of certain zoning ordinances that facilitated adherence to certain restrictive principles of Orthodox Judaism. Airmont was incorporated in a movement critical of the zoning measures adopted by the Town. The evidence at trial, viewed in the light most favorable to the private plaintiffs as the parties challenging the entry of judgment against them as a matter of law, *see, e.g.*, *Binder v. Long Island Lighting Co.*, 57 F.3d 193, 198-99 (2d Cir. 1995), included the following.

A. *Ramapo Allows Home Synagogues; Airmont is Incorporated*

Strict observance of Orthodox Judaism necessitates a relatively high number of local houses of worship. Daily prayer is required, and the saying of certain prayers and the reading from the Torah on the Sabbath require the presence of a "minyan"—a quorum of ten males over the age of 13. Orthodox Jews are forbidden to use cars or other means of transportation during religious holidays and the weekly Sabbath; thus, adherents are required to walk to their houses of worship. The combination of these requirements makes it important for Orthodox Jews to be able to gather for worship in congregations large enough to ensure the presence of a minyan, and close enough to the congregants' homes to allow them to walk to services.

Ramapo has a zoning code ("Ramapo Code") that, in most residential areas, allows a place of worship to be built only on a lot that is at least two acres in size. Construction of a synagogue on such a lot would cost as much as $750,000, an expenditure that would require the support of approximately 150 families, far beyond the number of Orthodox Jewish families living near each other in Airmont. However, the Ramapo Code also includes a provision for "home professional offices" ("HPO"), which permits members of the "learned professions," including clergy, to operate offices within their homes, subject to certain restrictions. It provides that HPO use

> shall be incidental and secondary to the use of the residence for dwelling purpose, shall not change the character thereof and shall not have any evidence of such accessory use other than a permitted announcement sign. Said activity shall not occupy more than one-half (½) of the ground floor area of the residence or its equivalent elsewhere in the residence if so used. In said activity, no more than two (2) persons, including members of the family residing on the premises, shall be employed. Permissible "home professional office" uses include, but are not limited to, the following: clergymen, lawyers, physicians, dentists, architects, engineers or accountants.

Ramapo Code § 376-181, at 37678.

In recognition of the needs of Orthodox Jews for local houses of worship, the Town in the mid-1980s adopted an interpretation of its Code's HPO provision that permitted "home synagogues," by allowing rabbis to conduct worship services within their homes for groups not exceeding 49 individuals.

Until 1991, Airmont was an unincorporated area of Ramapo, governed by the Town's zoning decisions. In the mid-1980s, an organization called the Airmont Civic Association, Inc. ("ACA"), began to push for Airmont's incorporation. ACA was troubled by Ramapo's practice of allowing home synagogues under the HPO provision; it was also concerned about the purchase of a tract in an area of Airmont by a Hasidic group, and about proposed zoning for multiple-family housing in the Monsey section of Ramapo, which would facilitate the growth of the largely Hasidic population there.

ACA's principal goal was to gain control of zoning of the Airmont area. For example, a 1986 flyer invited residents to attend an ACA meeting, asking "WHY DO WE NEED TO INCORPORATE?" and listing "Zoning control and enforcement" among the reasons. Another 1986 ACA flyer focusing on the proposed Monsey zoning for multiple-family housing stated that "the Airmont Civic Association [was] concerned about zoning changes in our neighborhood," quoting a local newspaper article describing the proposal

> "that the town provide the Monsey area with some form of multi-family zoning to accommodate a large Hasidic community. For cultural and religious purposes, Hasidim need to live in close proximity to one another."

The flyer stated, "We need control over zoning . . . ."

Throughout the period prior to Airmont's incorporation, ACA emphasized the need for control over zoning in connection with the desire to keep Orthodox and

Hasidic Jews out of the Airmont community. For example, ACA leaders polled Airmont residents as to their views, and one response, read aloud by ACA leaders at an August 1986 ACA meeting, stated as follows:

> [W]hat would be better, for us to loose [*sic*] our homes for a religious sect or for us to live as we have lived for the past 25 years . . . .
>
> . . . .
>
> . . . . [L]et the people in the unincorporated Area of Ramapo, go ahead and fight for what they believe in. Instead of giving up for what we've worked very hard for, to a bunch of people who insist on living in the past. I am not prejudice [*sic*] in any way, shape or form but i [*sic*] *will not* have a hasidic community in my backyard.

(Emphasis in original.) The minutes of the same meeting forecast "a grim picture of a Hasidic belt from Rockland through Orange & Sullivan counties." At a September 1986 meeting shortly after a Hasidic developer had bought land in the Airmont area, one of those attending referred to that purchase and stated that "everybody knows . . . why the Airmont Civic Association was formed. What does the Airmont Civic Association and the proposed village plan to do to keep these Hasidum [*sic*] out?" (Trial Transcript ("Tr.") at 2989.) The developer testified that in 1987, ACA's original president, James Filenbaum, stated that "the reason of forming this village is to keep people like you out of this neighborhood." (Tr. at 890.) At an ACA meeting in the spring of 1989, shortly after the Airmont area residents had voted for incorporation, the suggestion of one resident that ACA get involved in planting trees was met with

> a lot of grunts and groans from the audience and everything, and I heard Mr. Fletcher sitting in the back of the room respond to that by saying, you know, let's face it, the only reason we formed this village is to keep those Jews from Williamsburg [a Hasidic community in Brooklyn, New York] out of here.

(Tr. at 4031.) And a 1990 meeting notice proclaimed

> Only YOU can save your neighborhood!
>
> Please attend this important public hearing
>
> . . . .
>
> . . . . We urge you to express your views on the proposed complete restructuring of the town's zoning code to allow establishment of houses of worship by right in **ANY** home in **ANY** neighborhood.
>
> . . . . We cannot allow this disastrous abuse of our Master Plan.

(Emphasis in original.)

The referendum on incorporation of Airmont was held in early 1989. Though apparently most Orthodox Jews voted against incorporation, and a number of non-Orthodox residents opposed on tax-burden grounds, the vote was in favor of incorporation by a 3-1 margin. After delays for litigation, the Village of Airmont was finally incorporated in April 1991.

B. *The Present Lawsuits; Subsequent Events; the Jury Verdicts*

Two days after the Village was formally incorporated, the private plaintiffs commenced their present action, eventually naming as defendants the Village, ACA, Ramapo, and several leaders of the incorporation movement. Plaintiffs charged that Airmont's incorporation had been undertaken with the purpose of excluding Orthodox Jews, in violation of, *inter alia*, the First Amendment and the Fair Housing Act, and they sought damages and injunctive relief. Plaintiffs unsuccessfully moved for a preliminary injunction to prevent the election of Village officials; the district court denied their motion on the ground that they failed to make a showing of irreparable harm. *See LeBlanc-Sternberg v. Fletcher*, 763 F. Supp. 1246, 1250-52 (1991). In May 1991, Village elections were held, and the slate of candidates supported by ACA was victorious. Defendant Maureen Kendrick, ACA president from 1988 through 1989, was elected Mayor; the four Village trustees were Fletcher, who was ACA president in 1991, Vertullo, who was an ACA member and a political ally of Fletcher, and defendants John Layne and Marianne Cucolo, who were ACA Board members. Defendant Raymond Kane, also an ACA Board member, was elected a Village trustee in 1992.

The United States commenced its action under the FHA against Airmont and its trustees in December 1991, alleging that the Village had been incorporated for the purpose of excluding Orthodox Jews through zoning restrictions on their places of worship. The government sought, *inter alia*, a declaratory judgment that the Village and its trustees had violated the FHA and an injunction against further violations. The private and government actions were consolidated for discovery and trial.

The private plaintiffs' damages claims were to be tried to a jury at the insistence of the defendants. Though plaintiffs, initially having requested a jury trial, sought to withdraw that request, defendants exercised their right to a jury trial on those claims. Accordingly, an approximately two-month consolidated trial was held before Judge Goettel, with a jury empaneled to decide the damages claims of the private plaintiffs, and the court to act as factfinder on their equitable claims and the claims of the government.

At trial, the government and the private plaintiffs introduced evidence of the events described above, as well as evidence that ACA had forcefully opposed and challenged certain synagogue applications for HPO approval or for slight zoning variances. For example, in 1989, Rabbi Chaim Friedman, seeking to construct a free-standing synagogue, applied for a variance from the Ramapo Code's two-acre restriction because his lot was 1.926 acres; he also sought to include a structure on the lot that would be his residence. Approval of Rabbi Friedman's 1989 application was delayed by ACA opposition. Approval was initially given in 1991; final approval was given in May 1992 following the conclusion of a proceeding under N.Y. Civ. Prac. L. & R. Art. 78 ("Article 78"), brought by ACA member James Montone.

In 1989, Rabbi Sternberg applied for permission to conduct services in his home; ACA strongly opposed, sending six or more members to a Ramapo Planning Board meeting at which the application was to be considered. Each spoke in opposition to the application. According to plaintiff Fred Walfish,

> Mr. Fletcher said we knew when we moved to the area there were no houses of worship and we knew that the zoning ordinance didn't allow these residential houses of worship and we brought our own

> problems among ourselves and we should have never moved into the area.

(Tr. at 251.) The position expressed by ACA's then-president Kendrick, as described by Walfish, was similar:

> [t]hat we [Orthodox Jews] knew that there were no houses of worship when we moved here; we shouldn't . . . have moved here; we were foreigners and interlopers coming from outside; we were ignorant and uneducated; [and that] the entire community was an insult to the people who lived there previously.

(*Id.*)

The Sternberg application was initially denied; it was then twice approved, with the restrictions that the HPO could be used only on Jewish holidays and the Sabbath and for no more than 40 congregants, and was twice successfully challenged on technical grounds in Article 78 proceedings financed by ACA. A third and final approval in 1991 did not meet a court challenge. By this time, Airmont had been incorporated. The Village decided not to pursue a third Article 78 proceeding; Cucolo, a Village trustee who was also an ACA board member, stated that the Village did not "have to pursue an Article 78, there are other ways we can harass them." (Tr. at 3599-600.) Thereafter, Montone and others posted themselves outside of Rabbi Sternberg's home to count the arriving congregants; Montone at other times parked in front of the homes of other Orthodox Jews during their prayer times.

Plaintiffs also introduced evidence that in January 1993, Airmont adopted its own zoning code ("Airmont Code"), modifying the Ramapo provision for home professional offices. Airmont's version requires that an HPO

> shall be incidental and secondary to the use of the residence for dwelling purpose, shall not change the character thereof and shall not have any evidence of such accessory use other than a permitted announcement sign. *It is the intent of this Local Law that the home professional office shall not generate activities that come into a residential area so as to detract from the residential character of the area.* Said activity shall not occupy more than one-half ($^1/_2$) of the ground floor area of the residence or its equivalent elsewhere in the residence if so used. In said activity, no more than two (2) persons, including members of the family residing on the premises, shall be employed. Permissible "home professional office" uses include, but are not limited to, the following: clergymen, lawyers, physicians, dentists, architects, engineers or accountants, *if said use meets the other requirements of this Local Law. Any aggrieved person shall apply to the Zoning Board of Appeals for an interpretation as to whether or not a proposed activity or use constitutes a permissible home professional office. It is the intent of this Local Law that the home professional office shall only be an accessory use and that the residential character of the neighborhood involved shall be maintained at all times.*

Airmont Code, art. XVIII(2) (unemphasized language in Ramapo Code § 376-181, at 37678; emphasized provisions added by Airmont). The Village appointed a Zoning Board of Appeals and a Planning Board to interpret and apply the Airmont zoning code. Montone, who, *inter alia*, had stated at an ACA meeting his view that "most people were against houses of worship in residential areas," and had conducted surveillances of Orthodox Jewish homes at prayer times, was one of those appointed to the Airmont Planning Board. When the Airmont zoning code was adopted, Kendrick was the Village's mayor; Fletcher, Layne, and Kane were three of its four trustees. These four officials testified at trial that they were opposed to the Ramapo-type interpretation of the HPO provision to allow worship services in the homes of clergy. Plaintiffs contended that, in light of all that had occurred, the interpretation that Airmont would give its amended HPO provision was a foregone conclusion.

In defense, defendants contended that plaintiffs could not show any injury from defendants' conduct. Both the Friedman and Sternberg applications had eventually been approved by Ramapo's Planning Board. Although the Friedman synagogue had not been built, defendants argued that this was because of the loss of congregants and the Rabbi's failure to apply for necessary approval from state agencies. Defendants also attempted to show that the zoning concerns that led them to incorporate and to adopt a strict zoning policy were legitimate and nondiscriminatory. Ramapo's Town Supervisor testified that an Orthodox Jew had complained about the expansion of a synagogue near his home. The granddaughter of an Orthodox Jewish rabbi testified that Ramapo had allowed a synagogue on a three-quarter-acre lot next to her home and that she had experienced terrible trouble with traffic, parked cars blocking her mailbox, noise, and spotlights. Kendrick testified that she had opposed the development in which Rabbi Sternberg's home was built on the basis that it was on a flood plain, that the land had once been a garbage dump and might have been contaminated, and that the new construction required the rerouting of the existing river bed.

Plaintiffs, however, introduced evidence that the zoning concerns of ACA and the Airmont trustees had been selective, focusing only on Orthodox synagogues. Thus, whereas home synagogues were opposed in part because they would result in traffic or noise, nonreligious uses of land that caused those problems were not opposed. For example, Kendrick did not complain about a recreational lake with tennis courts and a refreshment stand near her house, though she testified that on weekends these facilities attracted a hundred cars and hundreds of people. Similarly, a certain country club generated what one witness characterized as "a total nightmare between the traffic and the terrible noise." (Tr. at 5335.) Fletcher, however, had argued that ACA should not take action against the club, fearing that if the club were closed, the owner "was going to sell it to the Orthodox people to live on" (Tr. at 5344-45). And whereas ACA had opposed even a slight variance to allow Rabbi Friedman's congregation to build a synagogue on a lot that was nearly two acres, the ACA board members had unanimously declined to oppose a variance for a too-tall spire on a Catholic mausoleum, with Layne stating that they should take that position "because this is the Catholic church that wants it" (Tr. at 3025).

After the close of the evidence, the district court submitted the private plaintiffs' damages claims to the jury. The claims against several of the originally-named defendants had been settled or dismissed prior to trial; in addition, a default had been entered against ACA, which apparently had no remaining assets or officers. The private plaintiffs' surviving claims were those against Fletcher, Layne, Vertullo, Kendrick, Kane, and the Village.

The court submitted to the jury a special verdict form containing a number of interrogatories. For purposes of the present appeal, the pertinent interrogatories posed the following questions and required the jury to respond as to the Village and as to each of the other five defendants "Individually":

> (1) "Did any of the Defendants violate Plaintiffs' fair housing rights?"
>
> (2) "Did any of the Defendants conspire to violate Plaintiffs' constitutional rights to the free exercise of religion [or] free speech?"

Question (2) originally asked whether any defendants had conspired to violate plaintiffs' rights to exercise of religion "and" free speech; the "and" was changed to "or" in response to a question from the jury during deliberations as to whether, in order to find in favor of plaintiffs, it was required to find a conspiracy to violate both rights. The verdict form also asked the jury to state the dollar amount of damages to which each plaintiff was entitled against any defendant found to have violated that plaintiff's rights, and to make a finding as to whether a majority of the voters who had favored Airmont's incorporation were motivated in part by discrimination against Orthodox or Hasidic Jews.

After a week of deliberations, the jury returned a verdict finding in favor of the individual defendants on all questions, and finding that the majority of those voting in favor of incorporating Airmont had not been motivated by a discriminatory animus. However, the jury found against Airmont on questions (1) and (2), finding that the Village had violated the private plaintiffs' rights under the Fair Housing Act and had conspired to violate their rights under the First Amendment. The jury awarded zero damages.

The court promptly entered judgment on the verdict in the private plaintiffs's action, reciting (a) that the claims against the individual defendants were dismissed, (b) that the private plaintiffs had prevailed on jury interrogatories (1) and (2) against the Village, and (c) that plaintiffs were awarded zero damages. As described below, the court also denied plaintiffs' claims for injunctive relief.

C. *The Decisions of the District Court*

Two days after the jury's verdict, the district court found against the government in the latter's action against the Village and the trustees for declaratory and injunctive relief. In a reported opinion dated December 15, 1993, *see United States v. Village of Airmont*, 839 F. Supp. 1054 ("Government Suit Opinion"), the district court found that the only action taken by the Village after its incorporation that could possibly support the government's claim was the 1993 adoption of the zoning code, which the court found not to be appreciably different from Ramapo's Code. The court stated that while the "minor" differences between Ramapo's Code and the one adopted by Airmont "arguably could be taken as a signal for a different interpretation," Government Suit Opinion, 839 F. Supp. at 1061, it was equally likely that, in order to avoid the cost of litigation, the Village might not interpret its code to prevent the use of HPOs by Orthodox and Hasidic rabbis for worship services:

> Viewing the evidence in the light most favorable to the Government, we can foresee that the Planning Board and the Zoning Board of Appeals (to the extent the matter might be submitted to it) will not adopt the Ramapo interpretation of the home professional office exception. It may also be true that the absence of actions by the Village and its officials adverse to Orthodox and Hasidic Jewish interests has been due in part to the existence of the . . . lawsuits. However, it may equally be true that, having learned the extreme costs of litigation from these lawsuits, the Village will have no interest in taking actions against residential synagogues or doing anything else which has an adverse effect on the availability of housing for Orthodox or Hasidic Jews.

Id. at 1064 (footnote omitted). The court stated that if the Village of Airmont had developed a reputation as a community that was hostile to Orthodox and Hasidic Jews, "it is largely the result of these . . . lawsuits brought against it by the various plaintiffs and the extensive publicity plaintiffs have intentionally generated." *Id.* at 1062-63.

The court concluded that because the Village itself had done nothing but adopt its own zoning code and had not yet been called upon to apply it, the government had not established a case for injunctive relief. The court took note of the government's argument that " '[a] suit for an injunction deals primarily not with past violations but with threatened future ones; . . . [and that] an injunction may issue to prevent future wrong, although no right has yet been violated' " (Government's proposed findings of fact and conclusion of law (quoting *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928))), but the court ruled that *Swift* was inapposite because it involved enforcement of a consent decree, and the Village had not entered into such a decree. The court concluded that

> if there is any action taken in the future which violates their rights, the United States Government and other plaintiffs will not be timorous about suing. Consequently, we see no basis or need for injunctive relief.

Government Suit Opinion, 839 F. Supp. at 1064. The court also stated its view that the type of injunctive relief requested by the government was inappropriate, stating, *inter alia*, that an injunction prohibiting Airmont from denying persons their constitutional or legal rights on account of their religion was unnecessary because it would merely enjoin acts that are already illegal. *See id.* at 1065.

In entering its initial judgment in the private plaintiffs' action, the district court, in addition to dealing with plaintiffs' damages claims in accordance with the jury verdicts, denied plaintiffs' claims for injunctive relief against the Village on the basis of its view of the evidence as set forth in its Government Suit Opinion:

> The court [after the jury returned its verdict] determined that the plaintiffs were not entitled to the injunctive relief requested in the complaint under the evidence presented at trial as set forth in the Court's opinion in United States of America -vs- The Village of Airmont which was tried jointly but without a jury and the jury's answers to the special interrogatories . . . .

Following the issuance of the district court's decision against the government and the entry of the judgment in the private action, the Village timely moved under Fed. R. Civ. P. 50(b) for judgment as a matter of law ("JMOL"). In a reported opinion dated March 16, 1994, *see LeBlanc-Sternberg v. Fletcher*, 846 F. Supp. 294 ("JMOL Opinion"), the court granted the motion, stating that the verdict appeared to be internally inconsistent because the jury had found in favor of the individual defendants but "did not award any damages, not even the $1 nominal damages it could have awarded on the civil rights claim." JMOL Opinion, 846 F. Supp. at 295. On the basis of the facts it had found with respect to the government's claim, the court concluded that the Village was entitled to judgment as a matter of law dismissing the claims of the private plaintiffs:

> Directly after the jury reached its verdict, the court issued its 34 page opinion on the bench trial of the case brought by the United States Government, finding for the Village and its Trustees. The facts recited in that opinion, as well as the legal conclusions reached therein, are hereby made a part of this decision as if set forth herein in full. The decision focused on the fact that the Village had not taken any significant action with respect to the claimed unfair housing and anti-religious practices. The Government's response, in essence, was that it had not done so simply because of the existence of the litigation against it and that in light of the prejudices of the individual defendants in this case (and certain of their successors), it might well do so in the future. We pointed out, *inter alia*, that, while zoning regulations and their interpretations could be, under some circumstances, unconstitutional and violations of the Fair Housing Act, such acts had not yet occurred and, indeed, might never occur.

> Consequently, there was no basis for injunctive relief at this time.
>
> The same reasoning which le[ ]d us to conclude that the Government had not proved the case against the Village of Airmont in its action also leads us to conclude that there was no possible basis for the jury's verdict against the Village.

JMOL Opinion, 846 F. Supp. at 295-96 (footnote omitted). The court added that

> [t]he only thing the plaintiffs can point to as an act of the Village was the adoption of the zoning code in January of 1993, almost two years after the commencement of this action. The adoption of the zoning code did not result in any amendment to the complaint of this action. Furthermore, no action has been taken as to the plaintiffs (or any other synagogue) under the newly adopted code. These plaintiffs, like the Government, argue that the Airmont zoning code, while quite similar to the pre-existing Town of Ramapo code, had a couple of changes in it which suggest a likelihood that, if the issue comes before them, the Airmont Planning Board and Zoning Board would not adopt the Ramapo solution with respect to home synagogues (known as "shteebles"). Even if this proves to be the case, it can have no impact on these plaintiffs, who have already gotten their zoning permission and who would be, at worst, a non-conforming use under the new zoning law.
>
> The plaintiffs also argue that the existence of the Village has a "chilling effect" on their protected class. However, 33 new Orthodox Jewish families moved in to the Park Avenue area, following the

> formation and operation of the Village. Consequently, we can see no basis in fact or law for the jury's verdict.

Id. at 296 (footnote omitted).

II. DISCUSSION

On appeal, the government contends principally that the district court erred in failing to recognize the Fair Housing Act's authorization of injunctive relief for anticipated future violations. The private plaintiffs contend principally that the court could not properly enter judgment against them as a matter of law on their claims against the Village; they also contend that the court erred in failing to award them nominal damages on those claims, and that because of errors in the court's instructions and evidentiary rulings, they are entitled to a new trial on their claims against the individual defendants. Fletcher and Vertullo, on their cross-appeal, argue that they should have been granted judgment as a matter of law at the close of the private plaintiffs' case.

For the reasons below, we conclude that the evidence was sufficient to establish that Airmont violated the private plaintiffs' rights under the Fair Housing Act and the First Amendment; that the district court was not entitled to set aside the jury's verdict against the Village on those claims on the basis of the court's own findings in the government's action; that in light of the established violation of their rights, the private plaintiffs were entitled to an award of nominal damages; that the jury's verdict against the Village constituted collateral estoppel that required the court to find that the government had established a violation by the Village; and that in ruling that injunctive relief was not appropriate, the court failed to apply pertinent FHA principles. We reject the private plaintiffs' appeal against the individual defendants, and we dismiss the cross-appeal as moot.

A. *The Private Plaintiffs' Claims*

1. *Fair Housing Act Principles*

The Fair Housing Act makes it unlawful "[t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of . . . religion." 42 U.S.C. § 3604(a). The phrase "otherwise make unavailable" has been interpreted to reach a wide variety of discriminatory housing practices, including discriminatory zoning restrictions. *See, e.g., Huntington Branch, National Association For the Advancement of Colored People v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir.), *aff'd*, 488 U.S. 15 (1988) (per curiam); *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252, 257 n.6 (1st Cir. 1993).

The FHA confers standing to challenge such discriminatory practices on any "aggrieved person," 42 U.S.C. § 3613(a)(1)(A). That term is defined to include

> any person who—
>
> (1) claims to have been injured by a discriminatory housing practice; or
>
> (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

42 U.S.C. § 3602(i). This definition requires only that a private plaintiff allege "injury in fact" within the mean-

ing of Article III of the Constitution, that is, that he allege "distinct and palpable injuries that are 'fairly traceable' to [defendants'] actions." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375-76 (1982). An injury need not be economic or tangible in order to confer standing. *See, e.g., id.* at 376 (deprivation of social benefits of living in an integrated neighborhood constitutes cognizable injury); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 111-12 (1979) (same). *See also* H.R. Rep. No. 711, 100th Cong. 2d Sess. 23, *reprinted in* 1988 U.S. Code Cong. & Admin. News 2173, 2184 (current statutory definition of "aggrieved person" was meant "to reaffirm the broad holdings" of *Havens Realty Corp. v. Coleman* and *Gladstone, Realtors v. Village of Bellwood*).

Further, the explicit grant of standing to anyone who believes he "*will* be injured by a discriminatory housing practice *that is about to occur*," 42 U.S.C. § 3602(i) (emphasis added), means that a person who is likely to suffer such an injury need not wait until a discriminatory effect has been felt before bringing suit. Thus, where it has been established that a zoning ordinance will likely be applied in a discriminatory manner, it is unnecessary that the municipality actually so apply it before the ordinance may properly be challenged. For example, in *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1214-16 (8th Cir. 1972), the defendant city contended that its incorporation and adoption of restrictive zoning ordinances created no harm that was yet justiciable because none of the plaintiffs had yet filed a building permit application that had been rejected. The Eighth Circuit rejected this contention, holding that the plaintiffs had alleged a cognizable harm under the FHA:

> The plaintiffs contend that the incorporation and the subsequent adoption of the zoning ordinance were aimed directly at the Park View apartments, and that these are unconstitutional actions by the city. There is no doubt but that the zoning ordinance forbids the building of these apartments. It forbids all apartments. It would be futile to require the plaintiffs to proceed any further at the local level.

Id. at 1216.

An FHA violation may be established on a theory of disparate impact or one of disparate treatment. *See Huntington Branch, National Association For the Advancement of Colored People v. Town of Huntington*, 844 F.2d at 934-35. Under the latter theory, a plaintiff can establish a *prima facie* case by showing that animus against the protected group "was a significant factor in the position taken" by the municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive. *United States v. Yonkers Board of Education*, 837 F.2d 1181, 1217, 1223, 1226 (2d Cir. 1987) ("*Yonkers*"), *cert. denied*, 486 U.S. 1055 (1988). If the motive is discriminatory, it is of no moment that the complained-of conduct would be permissible if taken for nondiscriminatory reasons. *See, e.g., id.* at 1218-19 (where site restrictions on low-income housing were imposed with segregative motive, fact that town had no duty to provide low-income housing was not significant); *United States v. City of Parma*, 661 F.2d 562, 574-75 (6th Cir. 1981) (city's abandonment of application for federal housing funds for racially discriminatory reasons violated FHA), *cert. denied*, 456 U.S. 926 (1982).

Discriminatory intent may be inferred from the totality of the circumstances, including "the fact, if it is true, that the law bears more heavily on one [group] than another," *Washington v. Davis*, 426 U.S. 229, 242 (1976), as well as

> the 'historical background of the decision . . . '; '[t]he specific sequence of events leading up to the challenged decision,' . . . ; 'contemporary statements by members of the decisionmaking body . . . '; . . . and '[s]ubstantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached,'

Yonkers, 837 F.2d at 1221 (quoting *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-68 (1977)); *see also United States v. City of Black Jack*, 508 F.2d 1179, 1185 n.3 (8th Cir. 1974) (racist statements by "leaders of the incorporation movement" and fact that "[r]acial criticism . . . was made and cheered at public meetings" could be considered evidence of improper purpose), *cert. denied*, 422 U.S. 1042 (1975).

On a claim for damages under the FHA, either party is entitled, under the Seventh Amendment, to demand a jury trial. *See Curtis v. Loether*, 415 U.S. 189, 192 (1974). If the claim for damages "is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact." *Id.* at 196 n.11.

2. *Principles Governing First Amendment Claims and Claims Under §§ 1983 and 1985*

The First Amendment, which is applicable to the states through the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), prohibits the states from making any law prohibiting the free exercise of religion. While it is unclear to what extent this prohibition requires states affirmatively to accommodate religious practice, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2243 (1993) (Souter, J., concurring) (discussing tension among Supreme Court holdings), it is firmly established that "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law . . . is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest," *id.* at 2227 (majority opinion), a test that the law will survive "only in rare cases," *id.* at 2233. "[A] law targeting religious beliefs as such is never permissible." *Id.* at 2227. *See also* 42 U.S.C. §§ 2000bb(b)(1), *et seq*, (restoring the "compelling interest" and "least restrictive means" tests after the Supreme Court had held in *Employment Division v. Smith*, 494 U.S. 872 (1990), that facially neutral laws would no longer be subject to this level of scrutiny under the First Amendment). In determining whether a law is based on religious animus, the same kinds of evidence noted above with respect to a disparate treatment claim under the FHA are relevant. *See generally Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. at 2230-31 (Kennedy, J., concurring) (citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. at 267-68).

A violation of one's rights under the Free Exercise Clause of the First Amendment may, in some circumstances, be actionable under federal civil rights statutes. Section 1983 creates a cause of action against any person who, acting under color of state law, deprives another of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States, 42 U.S.C. § 1983, including the First Amendment right to the free exercise of religion, *see, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. at 2224. Where a municipality's own policies deprive individuals of their federal rights, the municipality itself may be held liable. *See generally Monell v. New York City Department of Social Services*, 436 U.S. 658, 690-94 (1978).

Since the loss of First Amendment freedoms, even for minimal periods of time, constitutes irreparable injury, *see, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (freedom of association); *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) (freedom of expression), the victim of a conspiracy to violate First Amendment freedoms has standing to bring suit before the conspiracy has resulted in economic or tangible injury. *Cf. Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383, 393 (1988) (facial First Amendment challenge to law limiting display of sexually explicit material, prior to law's enforcement, was not premature).

Section 1985(3) creates a cause of action where "two or more persons in any State . . . conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." 42 U.S.C. § 1985(3). This section is applicable only if the plaintiff can show that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). Though the mere fact that "individuals . . . share a desire to engage in conduct" does not render them a "class" under § 1985(3), *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 759 (1993), proof that the defendants' impetus was the plaintiffs' religion suffices, *see Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc.*, 968 F.2d 286, 291 (2d Cir. 1992); *Colombrito v. Kelly*, 764 F.2d 122, 130-31 (2d Cir. 1985); *see also* Remarks of Senator Edmunds during debate preceding passage of Civil Rights Act of 1871, Cong. Globe, 42d Congress, 1st Sess. 567 (1871) (if a "conspiracy was formed against [a] man . . . because he was a Catholic, or because he was a Methodist . . . then this section could reach it"). *Accord Taylor v. Gilmartin*, 686 F.2d 1346, 1356-58 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983); *Ward v. Connor*, 657 F.2d 45, 48 (4th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

Establishment of a § 1985(3) claim requires proof of a conspiracy between "two or more persons." A conspiracy, for these purposes, need not be shown by proof of an explicit agreement but can be established by showing that the "parties have a tacit understanding to carry out the prohibited conduct." *United States v. Rubin*, 844 F.2d 979, 984 (2d Cir. 1988); *see also United States v. Wardy*, 777 F.2d 101, 107 (2d Cir. 1985), *cert. denied*, 475 U.S. 1053 (1986); *Snell v. Tunnell*, 920 F.2d 673, 702 (10th Cir. 1990) (conspiracy may be established by showing that "participants in the conspiracy . . . share the general conspiratorial objective") (internal quotes omitted), *cert. denied*, 499 U.S. 976 (1991). The term "persons" for purposes of § 1985(3) includes municipalities, *see Owens v. Haas*, 601 F.2d 1242, 1247 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979), and a claim under § 1985(3) may be established against a state if "it is proved that the State is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the State," *United Brotherhood of Carpenters*

& Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 830 (1983).

The district court instructed the jury on the elements of plaintiffs' causes of action under the FHA, § 1983, and § 1985(3). Although conspiracy is not a necessary element of a § 1983 claim, the court and the parties apparently viewed jury interrogatory (2), notwithstanding its reference to conspiracy ("Did any of the Defendants conspire to violate Plaintiffs' constitutional rights to the free exercise of religion [or] free speech?"), as encompassing not only the claims under § 1985(3) but also those under § 1983.

3. *Verdict Consistency*

One of the grounds on which the district court entered judgment as a matter of law against the private plaintiffs was that it believed the jury's verdict against the Village to be inconsistent with the jury's other verdicts. JMOL Opinion, 846 F. Supp. at 295. Though a judgment should not be entered awarding a plaintiff relief on the basis of inconsistent jury findings, ***see generally Brooks v. Brattleboro Memorial Hospital***, 958 F.2d 525, 529 (2d Cir. 1992); 5A *Moore's Federal Practice* ¶ 49.03[4], at 49-39 to 49-43 (2d ed. 1994 & Supp. 1995), we have several difficulties with the court's action here.

First, if the answers returned by the jury appear to be inconsistent with one another, "[i]t is the duty of the district court to attempt to harmonize the jury's answers, if it is at all possible under a fair reading of the responses." 9A C. Wright & A. Miller, ***Federal Practice and Procedure***, § 2510, at 200-01 (2d ed. 1995). Thus, "[w]here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be

resolved that way." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962); *see, e.g.*, *Brooks v. Brattleboro Memorial Hospital*, 958 F.2d at 529; *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 891 (2d Cir. 1988).

Second, in dealing with jury responses that are inconsistent, proper deference to the parties' Seventh Amendment rights to a jury trial precludes entry of a judgment that disregards any material jury finding. *See, e.g.*, *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. at 364; *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d at 890-91. Thus, if there is no way in which the jury's answers may be harmonized, the court must order a new trial. *Id.* at 891. Our responsibility as a reviewing court is the same. It is not the province of either court simply to enter a judgment that overrules some of the jury's findings.

In sum, if the district court in the present case considered the jury's verdict of liability against the Village to be inconsistent with the verdicts in favor of the individual defendants or the denial of damages, the court should have sought an explanation, supportable by the record, that was not inconsistent. If it failed to find such an explanation, it should have ordered a new trial. If we concurred in the district court's view that the jury's verdicts were inconsistent, we would vacate the judgment dismissing the private plaintiffs' complaint and remand for a new trial.

Given the record in this case, however, we are not in agreement with the district court's assessment that because only the Village, and not the remaining individual defendants, was found to have violated the private plaintiffs' rights under the FHA and to have conspired to violate their First Amendment rights, the verdicts were internally inconsistent. To the contrary, as discussed below, these findings were consistent with each other, were supported by the evidence, and evinced obedience to the trial court's instructions.

In finding that only the Village violated the private plaintiffs' rights under the Fair Housing Act, the jury may have been persuaded that the only violative act was the enactment of the Airmont zoning code. It is a fair inference that the jury viewed the Village's enactment of that code, with provisions facilitating rejection of HPO applications, as an act that was designed to limit the number of home synagogues and that was thus about to make dwellings unavailable to Orthodox Jews because of their religion. The fact that the jury did not find that the individual defendants so acted was not inconsistent with the finding that the Village itself had committed the violation, because the enactment was that of the Village and the trial court had given an instruction, in response to a question from the jury during its deliberations, that under the doctrine of "legislative immunity," "Village officials who vote for the passage of something cannot be held liable for damages by voting for it." (Tr. at 5855.)

Nor was there inconsistency in the jury's findings that only the Village, and none of the five remaining individual defendants, had conspired to violate plaintiffs' First Amendment rights. As to the § 1985(3) claim, though a conspiracy requires at least two coconspirators, the court had instructed the jury that "the law recognizes a corporation and its officers . . . as a single entity" (Tr. at 5668-69). Thus, the jury had been advised that it could not find a conspiracy between the Village and its officers. More importantly, the only persons other than the Village about whom the jury was asked were Fletcher, Layne, Vertullo, Kendrick, and Kane, and it is easily inferable that the jury found that the Village had conspired with someone about whom the jury was not expressly asked, to wit, ACA. No interrogatory was posed with respect to ACA, apparently because the court had previously entered a default against it. There was abundant evidence, however, that ACA had persistently urged incorporation of the Village expressly in order to gain control of zoning in order to keep Orthodox and Hasidic Jews from moving to the Airmont area. For example, at a meeting at which the proposed incorporation was discussed, an ACA member asked, "What does the Airmont Civic Association and the proposed village plan to do to keep these Hasidum [*sic*] out?" (Tr. at 2989.) After the Village's incorporation, ACA's slate of candidates was elected to be Airmont officers; and the Village proceeded to appoint the ever-vigilant, anti-HPO, ACA member Montone to one of the Airmont zoning bodies. In short, the evidence amply permitted the jury to find that ACA and the Village shared a general conspiratorial objective and that ACA was a coconspirator in the Village's adoption of a zoning code that was intended to be applied to achieve ACA's announced discriminatory goal.

Further, though conspiracy is not a necessary ingredient of a claim pursued under § 1983, the jury's finding that the Village had conspired to violate plaintiffs' First Amendment rights, like its finding that the Village had violated their rights under the FHA, sufficed to establish the Village's liability under § 1983.

The jury's finding that the private plaintiffs had not suffered monetary damages "as a result of the actions by any Defendant" was explainable by the evidence that there had been no applications for pertinent variances or home synagogues under the Airmont code, and by the trial court's failure to instruct the jury that if it found a civil rights violation it must award at least nominal damages. As discussed in Part II.A.5. below, the court had instructed the jury only that it "may" award nominal damages.

In sum, the jury's verdicts are consistent with fully supportable findings that ACA and the Village conspired to impede the private plaintiffs' exercise of their rights under the First Amendment; that the Village adopted a zoning code that was intended to, and would be interpreted to, curtail home synagogues, thereby deterring Orthodox Jews from purchasing homes in many Airmont neighborhoods; and that because no applications had been made for HPO or variance approvals under the Airmont code, the plaintiffs had not suffered an injury for which the jury wished to award damages.

In recognition of the parties' Seventh Amendment rights to have the private plaintiffs' claims decided by the jury, the district court was required to accord the jury's verdicts an interpretation such as this, which is reasonable, supported by the evidence, and not internally inconsistent.

4. *Sufficiency of the Evidence To Withstand a Rule 50(b) Motion*

The other ground on which the district court set aside the jury's verdict against the Village was that that verdict did not accord with the court's own findings. This was not a proper basis on which to rule on the Village's Rule 50(b) motion.

In ruling on a motion for judgment as a matter of law under Fed. R. Civ. P. 50(b), formerly called a judgment notwithstanding the verdict ("n.o.v."), *see Piesco v. Koch*, 12 F.3d 332, 340 (2d Cir. 1993) (though Rule 50(b) was amended in 1991 to replace the term "judgment n.o.v." with the phrase "judgment as a matter of law," the substance of the Rule was not changed), a district court is required to

> consider the evidence in the light most favorable to the party against whom the motion was made and to give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence. The court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury.

Smith v. Lightning Bolt Productions, Inc., 861 F.2d 363, 367 (2d Cir. 1988) (internal quotes omitted); *see Gibeau v. Nellis*, 18 F.3d 107, 110 (2d Cir. 1994); *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970). Only if there is "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against [the moving party]" may the court properly grant the motion. *Song v. Ives Laboratories, Inc.*, 957 F.2d 1041, 1046 (2d Cir. 1992) (internal quotes and alterations omitted). The same standard governs appellate review of a decision granting or denying judgment as a matter of law. *See, e.g., Binder v. Long Island Lighting Co.*, 57 F.3d at 198-99 (grant); *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d at 889 (denial).

In the present case, in granting the Village's Rule 50(b) motion against the private plaintiffs, the district court noted that the court's own 34-page opinion had found in favor of the Village in the suit brought by the government; and it made "[t]he facts recited in that opinion . . . a part of this decision as if set forth herein in full," JMOL Opinion, 846 F. Supp. at 295. The court stated that "[t]he same reasoning which le[ ]d us to conclude that the Government had not proved the case against the Village of Airmont in its action also leads us to conclude that there was no possible basis for the jury's verdict against the Village," *id.* at 295-96. We have several difficulties with this ruling.

First, despite the court's ultimate findings in favor of the Village, several of its own statements in the Government Suit Opinion belie its JMOL Opinion statement that there was no possible basis for the jury's verdict against the Village. For example, in its Government Suit Opinion, the court stated that Airmont's changes to the language used in the Ramapo Code "could be taken as a signal for a different interpretation." Government Suit Opinion, 839 F. Supp. at 1061. The court stated as well that "[i]t may also be true that the absence of actions by the Village and its officials adverse to Orthodox and Hasidic Jewish interests has been due in part to the existence of [these] lawsuits." *Id.* at 1064. Further, the court acknowledged that "[v]iewing the evidence in the light most favorable to the Government, we can foresee that the Planning Board and the Zoning Board of Appeals . . . will not adopt the Ramapo interpretation of the home professional office exception." *Id.* Had the government's suit been the only case tried, the court acting as factfinder of course would not have been required to view the evidence in the light most favorable to the government (or any party). In ruling on the motion by the Village for judgment as a matter of law, however, the court was required to view the evidence in the light most favorable to the private plaintiffs. Plainly the court's decision in the government's case rejected the view of the evidence that was most favorable to the plaintiffs, as the court ultimately concluded that the differences between the Ramapo Code and the Airmont provision were inconsequential and that the latter might not be interpreted to prevent home synagogues. Moreover, given the plethora of statements in the record attributed to ACA leaders who became Village officials, expressing anti-Orthodox Jewish sentiments (*e.g.*, by Kendrick, who eventually became mayor (describing Orthodox Jews as "foreigners and interlopers," who were "ignorant and uneducated" and "an insult to" the community); Fletcher, who eventually became a trustee ("the only reason we formed this village is to keep those Jews from Williamsburg out of here"); and Cucolo as a trustee (Village did not "have to pursue an Article 78 [with respect to Rabbi Sternberg's home synagogue], there are other ways we can harass them")), the court's finding that any reputation that the Village might have had for being hostile to Orthodox Jews had been created by the plaintiffs themselves was inconsistent with a viewing of the evidence in the light most favorable to plaintiffs.

Second, though the court stated that it was granting the Village's Rule 50(b) motion " 'without . . . considering the weight of the evidence,' " JMOL Opinion, 846 F. Supp. at 296 (quoting *Simblest v. Maynard*, 427 F.2d at 4), its reasoning indicates that it did weigh the evidence, for it incorporated in its JMOL ruling all of the findings it had made in the Government Suit Opinion. In the latter, it rejected the "foresee[able]" event that Airmont would interpret its code to deny home synagogue permits, finding it "equally" possible that the Village might forbear from such denials because of the cost of litigation. Government Suit Opinion, 839 F. Supp. at 1064. Such assessments of permissible competing factual inferences plainly bespeak a weighing of the evidence.

Finally, and most importantly, whatever its own view of the facts may have been, the court was not entitled to substitute its view for adequately supported findings that were implicit in the jury's verdict. The evidence showed that Orthodox Jews need to be able to worship in a group large enough to guarantee a minyan but close enough to home to allow them to walk to services on their Sabbath and holy days. That need appears to be unique to Orthodox and Hasidic Jews, as only these groups had applied to conduct services in their clergy's homes under Ramapo's HPO provision. The plaintiffs' evidence showed that building a synagogue on a lot more than two acres in size, instead of using home synagogues, would not be economically feasible. The defendants who were the Village's mayor and three of its four trustees when the Village adopted its own zoning code testified that they opposed approvals for home synagogues.

The events cited by ACA leaders as evincing a need for Airmont's incorporation and gaining control of zoning amply supported a finding that the impetus was not a legitimate nondiscriminatory reason but rather an animosity toward Orthodox Jews as a group. They wrote and spoke of Ramapo's interpretation of its HPO provision to permit home synagogues and of its adoption of multiple-family housing as leading to the "grim picture of a Hasidic belt." They cited potential traffic and noise problems among their reasons for opposing home synagogues but tolerated existing traffic and noise caused by secular uses; indeed, such problems emanating from a country club were deliberately ignored for the stated reason that if they were challenged, the owner might sell the property to Orthodox Jews. And whereas ACA opposed even a slight zoning variance for the construction of a synagogue on a lot that was very nearly two acres, there was testimony that its board unanimously elected not to oppose a height variance for a Catholic mausoleum spire "because this is the Catholic church that wants it."

Lest the events themselves left any doubt, the record is replete with other statements of anti-Hasidic animus made or adopted by ACA leaders, such as, "i [*sic*] *will not* have a hasidic community in my backyard" (emphasis in original); and "the reason of forming this village is to keep people like you out of this neighborhood."

Taking the evidence in the light most favorable to the private plaintiffs, there was ample support for the jury's implicit finding that Airmont's zoning code would be interpreted to restrict the use of home synagogues, that the motivation behind the enactment was discriminatory animus toward Orthodox and Hasidic Jews, and that Airmont pursued this goal jointly with ACA. Accordingly, the private plaintiffs established the Village's liability on the claims asserted under the FHA, the First Amendment, and §§ 1983 and 1985(3).

5. *Entitlement to Nominal Damages*

A plaintiff who has proven a civil rights violation but has not proven actual compensable injury, is entitled to an award of nominal damages. *See, e.g., Cabrera v. Jakabovitz*, 24 F.3d 372, 391 (2d Cir.) (upholding district court's award of such damages in FHA action notwithstanding jury's refusal to award them), *cert. denied*, 115 S. Ct. 205 (1994); *Gibeau v. Nellis*, 18 F.3d at 110-11 (in § 1983 action, "an award of nominal damages is not discretionary where a substantive constitutional right has been violated"); *McKenna v. Peekskill Housing Authority*, 647 F.2d 332, 335-36 (2d Cir. 1981) (where First Amendment claim was established, "[i]f no actual damages exist, the district court is directed to enter a judgment for nominal damages in favor of the plaintiffs"). It is plain error for the trial court to instruct a jury only that, if the jury finds such a violation, it "may" award such damages, rather than that it must do so. *See Gibeau v. Nellis*, 18 F.3d at 110-11. Where a trial court has committed such an error, and the plaintiff has been awarded no actual damages, we will remand for the award of nominal damages. *See id.* at 111.

In the present case, the district court instructed the jury that if it found the defendants had violated the private plaintiffs' rights but that plaintiffs had suffered no actual damages, the jury "may" award plaintiffs nominal damages. (Tr. at 5686.) Since the jury found that the Village violated the private plaintiffs' FHA rights and conspired to violate their First Amendment rights, the Village's liability on the claims asserted under the FHA, § 1983, and § 1985(3) was established; since the jury found that plaintiffs were not entitled to compensatory damages, plaintiffs should have been awarded nominal damages.

6. *The Private Plaintiffs' Equitable Claims*

We also conclude that the district court erred in its denial of the private plaintiffs' claims for injunctive relief, which, unlike their damages claims, were tried to the court. When two claims asserted by the same plaintiff are tried together and one is to be decided by the jury and the other by the judge, principles of collateral estoppel prevent the judge from making findings of fact contrary to those of the jury. *See, e.g., Curtis v. Loether*, 415 U.S. at 196 n.11 (noting that in FHA suit, right to jury trial applies to all issues common to both legal and equitable claims, citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) (noting that in FHA suit, right to jury trial applies to all issues common to both legal and equitable claims, citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) (where legal and equitable claims are asserted in the same suit, legal claims must be decided first so that right to jury trial on legal issues will not "be lost through prior determination of equitable claims," *id.* at 511), and *Dairy Queen, Inc. v. Wood*, 369 U.S. 470-73 (1962) (same)); *Sorlucco v. New York City Police Department*, 971 F.2d 864, 873-74 (2d Cir. 1992); *Wade v. Orange County Sheriff's Office*, 844 F.2d 951, 954 (2d Cir. 1988). Indeed, in order to safeguard the parties' Seventh Amendment rights with respect to claims triable to the jury, the general rule is that the jury must be allowed to decide the legal claims prior to the court's determination of the equitable claims, *see, e.g., Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959); *Wade v. Orange County Sheriff's Office*, 844 F.2d at 954, in order to prevent the court's determination of a common factual issue from precluding a contrary determination by the jury through collateral estoppel.

Though the decisions in the present case were rendered in the proper sequence, the court's decision disregarded the estoppel effect to be given to the jury's verdict. In denying the injunctive relief requested by the private plaintiffs against the Village, the court disregarded the jury's findings against the Village and relied instead on the court's own findings in favor of the Village. The judgment stated, in pertinent part, that "[t]he court . . . determined that the plaintiffs were not entitled to the injunctive relief requested in the complaint under the evidence presented at trial as set forth in the Court's opinion in [the government's suit]." Though the granting or denial of injunctive relief lies within the court's discretion, a failure to apply a controlling legal principle constitutes an abuse of discretion, and the court here, in relying on its own findings that were inconsistent with the jury's findings, failed to apply controlling principles of collateral estoppel.

On remand, the court should consider, in light of the findings that the Village violated the Fair Housing Act and conspired to violate plaintiffs' First Amendment rights, whether injunctive relief may also be appropriate.

7. *The Claims Against the Individual Defendants*

The private plaintiffs also contend that they are entitled to a new trial on their § 1983 claims against the individual defendants, principally because the district court instructed the jury that the conduct of those defendants in pressing for Airmont's incorporation could not be considered state action. We reject plaintiffs' contention.

In certain contexts, private actors' conduct can be considered state action and thus governed by constitutional constraints that normally apply only to state and local governments. In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), the Supreme Court ruled that peremptory challenges to jurors by attorneys in civil litigation constituted state action, *see id.* at 622, applying the two-part test formulated in *Lugar v. Edmondson Oil*

Co., 457 U.S. 922, 937 (1982), for determining whether a given set of acts qualifies as state action. That test asks "first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, . . . and second, whether the private party charged with the deprivation could be described in all fairness as a state actor," ***Edmonson v. Leesville Concrete Co.***, 500 U.S. at 620. With respect to the second question, the court is to consider "the extent to which the actor relies on governmental assistance and benefits . . . ; whether the actor is performing a traditional governmental function . . . ; and whether the injury caused is aggravated in a unique way by the incidents of governmental authority." *Id.* at 621-22.

A drive for incorporation does not meet this test. The circulation of petitions for a referendum on incorporation is typically carried out by private persons in their individual capacities. The proponents may or may not collect enough signatures to call for the referendum. If there is a referendum, a majority of those voting may or may not vote for incorporation. ***See generally*** N.Y. Village Law §§ 2-200, 2-202, 2-212, 2-222 (McKinney 1973 & Supp. 1995) (territory of not more than five square miles, having at least 500 residents, may be incorporated after a referendum upon petition by at least 20 percent of the voting residents of that territory or by the owners of more than 50 percent of the territory's real property, measured by assessed value). If a majority of the voters do vote in favor, the ensuing creation of the village itself results from the "application of a neutral state law designed to give almost any group of residents the right to incorporate." ***Board of Education of Kiryas Joel Village School District v. Grumet***, 114 S. Ct. 2481, 2491 n.7 (1994). The incorporation is merely a change in status that gives the incorporated body certain powers. The status itself does not necessarily indicate how those powers will be used. *See id.* at 2505 (Kennedy, J., concurring) ("People who share a common religious belief or lifestyle may live together without sacrificing the basic rights of self-governance that all American citizens enjoy, so long as they do not *use* those rights to establish their religious faith." (Emphasis added.)).

The power of a village to adopt a zoning code has its source in state authority, and Airmont's adoption of its own zoning code with its differences from the Ramapo Code to facilitate the rejection of HPOs, was of course state action. But it was that enactment, rather than the mere achievement of incorporated status, that affected zoning and the plaintiffs' rights. Accordingly, the district court did not err in instructing the jury that the individuals' acts to have the Village incorporated did not constitute state action.

We have considered all of plaintiffs' arguments in support of their contention that they did not receive a fair trial of their claims against the individual defendants and have found in them no basis for reversal. Accordingly, we affirm so much of the judgment in the private plaintiffs' suit as dismissed the claims against those defendants.

In light of this decision, the cross-appeal of Fletcher and Vertullo, arguing that they were entitled to judgment as a matter of law at the close of the private plaintiffs' case, is moot.

B. *The Government's Action*

The government's action asserted claims only under the Fair Housing Act. Under that Act, the basic principles of which are discussed in Part II.A.1. above, the Attorney General of the United States has authority to enforce the Act by bringing a civil action if she determines that the violation "raises an issue of general public importance." 42 U.S.C. § 3614(a). Like the private plaintiffs' equitable claims, the government's FHA claim against the Village and its trustees was tried to the district court rather than to the jury, and the district court found that no violation had occurred. Government Suit Opinion, 839 F. Supp. at 1068. As discussed in Part II.A.6. above, the jury's findings on plaintiffs' legal claims constituted collateral estoppel, preventing the court from making contrary findings as the factfinder with respect to the private plaintiffs' equitable claims. We conclude that the same principle should have constrained the court's findings in the government's suit.

In federal court, the applicability of collateral estoppel is not limited to cases in which there is a complete identity of parties. Offensive collateral estoppel, *i.e.*, foreclosing a defendant from relitigating an issue that it has litigated unsuccessfully in another action, *see Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.4 (1979), is also available to a new plaintiff when the defendant had essentially the same opportunity and incentive to litigate the issue fully and fairly in the other suit. *Parklane Hosiery* counsels against the application of nonmutual offensive collateral estoppel in cases where (1) the judgment relied on as the basis for estoppel is itself inconsistent with an earlier judgment in favor of the defendant; (2) the issue on which the plaintiff seeks to estop the defendant was not necessary to the prior judgment; or (3) the new plaintiff deliberately failed to participate in a prior suit for tactical reasons. *See id.* at 330-32.

On the record before us, none of the considerations that would justify a refusal to allow the use of offensive collateral estoppel is present. The findings of the jury with respect to the private plaintiffs' FHA claims against the Village necessarily determined all of the liability issues in the government's FHA claim against the Village. As the cases were tried jointly, there can be no question that the Village had the opportunity to, and did, fully and fairly litigate the issues. Since, as discussed above, the jury's verdict was fully supportable by the record, the district court was bound to respect that verdict and could not properly make findings that contradicted it. While for practical and policy reasons nonmutual offensive collateral estoppel is not routinely available *against* the government, *United States v. Mendoza*, 464 U.S. 154, 159-64 (1984); *see id.* at 160 (in many instances, "allowing nonmutual collateral estoppel against the Government would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue"), we see no reasons for denying the government the benefit of the estoppel where its equitable action has been tried jointly with the jury trial of a private plaintiff. Accordingly, the government was entitled to at least a declaratory judgment in its favor.

Finally, to the extent that the district court's decision also indicated the view that even if liability were established injunctive relief would not be proper, we conclude that its view represented a misapplication of the law. The court stated, for example, that it considered certain of the requested injunctive relief as "unnecessary since it would be enjoining acts which are already illegal." Government Suit Opinion, 839 F.Supp. at 1065. It also indicated that injunctive relief was unwarranted because "if there is any action taken in the future which violates [Orthodox or Hasidic Jews'] rights, the United States Government and other plaintiffs will not be timorous about suing." *Id.* at 1064.

Neither observation was a valid ground for denial of an injunction prohibiting the application of the Airmont zoning code in the discriminatory manner found to be predictable from the evidence in this record. See Part II.A.4. above. The maxim that "equity will not enjoin a crime," 11A C. Wright & A. Miller, *Federal Practice and Procedure*, § 2942, at 70 (2d ed. 1995) (internal quotes omitted), does not hold where Congress has explicitly authorized injunctive relief. *See United States v. Private Sanitation Industry Ass'n*, 995 F.2d 375, 377-78 (2d Cir. 1993) (per curiam) (holding that injunction against unlawful act was authorized by statute); 5 *Moore's Federal Practice* ¶ 38.24[3], at 38-208 to 38-214 (2d ed. 1994); Note, *Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 1015 (1965). The FHA expressly grants district courts the authority to enter such injunctive relief in a suit by the government against a party who has violated the Act "as is necessary to assure the full enjoyment of the rights granted by [the FHA]." 42 U.S.C. § 3614(d)(1)(A); *see also id.* §§ 3602(i), 3613(a), 3613(c)(1) (private party may bring suit based on a practice that has occurred or is about to occur, and court is authorized to grant injunctive relief in such an action).

The district court did not discuss FHA cases or principles in announcing its view that injunctive relief would be inappropriate. The view that such relief was premature because Airmont had not yet actually applied its zoning provision invidiously was a misapplication of the statute. On remand, the district court should, applying

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007
GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of November one thousand nine hundred and ninety-five.

LeBlanc-Sternberg
Plaintiffs-Appellants-Cross-Appellees,
Dkt No: 94-7103
v
Fletcher
Defendants-Appellees-Cross-Appellants.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the Defendants-Appellees The Village of Airmont, Raymond Kane, Maureen Kendrick and John C. Layne.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is *DENIED*.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT: GEORGE LANGE III, CLERK
s/ Beth J. Meador 11/28/95
Administrative Attorney

②

Supreme Court, U.S.
FILED

No. 951381 FEB 26 1996

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1995

◆

THE VILLAGE OF AIRMONT, and its Municipal Officers,

Petitioners,

-against-

RABBI YITZCHOK LEBLANC-STERNBERG, CHANIE LEBLANC-STERNBERG, FRED WALFISH, LEWIS KAMMAN, PARK AVENUE SYNAGOGUE, INC., UNITED STATES OF AMERICA,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RABBI YITZCHOK LEBLANC-STERNBERG,
CHANIE LEBLANC-STERNBERG, FRED
WALFISH, LEWIS KAPLAN, PARK
AVENUE SYNAGOGUE, INC.,
Plaintiffs,

-against-

ROBERT FLETCHER, NICHOLAS VERTULLO
and MAUREEN KENDRICK, and JOHN C.
LAYNE and RAYMOND KANE, Individually
and in their capacity as Trustees
of the Village of Airmont and THE
VILLAGE OF AIRMONT,
Defendants.

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91 Civ. 2550 (GLG)

MEMORANDUM DECISION

Defendant Village of Airmont moves for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b). The plaintiffs are an Orthodox/Hasidic Rabbi, his incorporated congregation and some members thereof. The defendants, at the time the action commenced, were Trustees of the newly formed Village of Airmont. Indeed, the action was commenced within days of the Village's formation. The plaintiffs claim that the defendants cumulatively had violated their rights under the Fair Housing

Act and various of their civil rights by virtue of discrimination against them as Orthodox and Hasidic Jews.

The trial of this case, which lasted a couple of months, was conducted simultaneously with the bench trial of *United States of America v. The Village of Airmont*, and its Trustees, in their official capacities, 91 Civ. 2550 (GLG). Following the trial, the jury deliberated for a full week (the longest civil deliberation this court has ever experienced) on this case. At its conclusion, the jury found in favor of all of the defendants individually and in their capacity as Trustees, but as to the Village of Airmont found that it had violated plaintiffs' Fair Housing rights and conspired to violate plaintiffs' constitutional rights to the free exercise of religion and free speech. The jury, however, did not award any damages not even the $1 nominal damages it could have awarded on the civil rights claim.

The evidence in the case concerned primarily the activities of the individual defendants in promoting the formation of the Village of Airmont. The plaintiffs sought damages and, with respect to the Village, injunctive relief dissolving it. At the time the complaint was served, the Village had just begun to exist. With a single possible exception discussed below, the Village, when sued and up to the time of the trial, had done nothing to the plaintiffs. While the plaintiffs arguably made out a case under certain of their causes of action against some of the defendants, they proved nothing with respect to the actions of the Village *qua* Village. Consequently, the jury's verdict seemed quite internally contradictory. Moreover, it clearly appeared to be a compromise verdict as it related to the Village.[1]

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[1] The court reached this conclusion prior to reading the newspaper reports of statements by jurors confirming the rendering of a compromise verdict. Needless to say, the newspaper reports are given

Directly after the jury reached its verdict, the court issued its 34 pages opinion on the bench trial of the case brought by the United States Government, finding for the Village and its Trustees. The facts recited in that opinion, as well as the legal conclusions reached therein, are hereby made a part of this decision as if set forth herein in full. The decision focused on the fact that the Village had not taken any significant action with respect to the claimed unfair housing and anti-religious practices.[2] The Government's response, in essence, was that it had not done so simply because of the existence of the litigation against it and that in light of the prejudices of the individual defendants in this case (and certain of their successors), it might well do so in the future. We pointed out, *inter alia*, that, while zoning regulations and their interpretations could be, under some circumstances, unconstitutional and violations of the Fair Housing Act, such acts had not yet occurred and, indeed, might never occur. Consequently, there was no basis for injunctive relief at this time.

The same reasoning which lead us to conclude that the Government had not proved the case against the Village of Airmont in its action also leads us to conclude that there was no possible basis for the jury's verdict against the Village. Plaintiff Park Avenue Synagogue, Inc., had obtained zoning approval for its services and operations before this action was commenced.

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no weight whatever in this decision.

[2] The Government's causes of action involved more than these plaintiffs and their congregation. Much of the proof concerned a Rabbi Friedman and his congregation, whose situation differed from the plaintiffs'.

The Village took no steps whatever to impede their religious worship.

The only thing the plaintiffs can point to as an act of the Village was the adoption of the zoning code in January of 1993, almost two years after the commencement of this action. The adoption of the zoning code did not result in any amendment to the complaint of this action. Furthermore, no action has been taken as to the plaintiffs (or any other synagogue) under the newly adopted code. These plaintiffs, like the government, argue that the Airmont zoning code, while quite similar to the pre-existing Town of Ramapo code, had a couple of changes in it which suggest a likelihood that, if the issue comes before them, the Airmont Planning Board and Zoning Board would not adopt the Ramapo solution with respect to home synagogues (known as "shteebles").[3] Even if this proves to be the case, it can have no impact on these plaintiffs, who have already gotten their zoning permission and who would be, at worst, a non-conforming use under the new zoning law.

The plaintiffs also argue that the existence of the Village has a "chilling effect" on their protected class. However, 33 new Orthodox Jewish families moved in the Park Avenue area, following the formation and operation of the Village. Consequently, we can see no basis in fact or law for the jury's verdict.

The trial court has the right to enter a judgement overturning a jury's verdict. *Berry v. U.S.*, 312 U.S. 450 (1941). Indeed, where reasonable minds cannot differ as to the facts a motion for judgment as a matter of law must be granted. *Pratt v. Liberty Mutual Insurance Co.*, 952 F.2d 667 (2nd Cir. 1992). The plaintiffs claim that the court cannot exercise this power since it has previously denied such a motion and that denial is the law of the case. This court did not deny such a motion. We reserved on the motions at the conclusion of evidence. Following the jury's verdict, we indicated that there did not appear to be any need to set aside the jury's verdict since no injunctive relief would be granted, but we stated that if we were compelled to enter some form of relief we would alternatively grant the Rule 50 application on which we were reserving decision. Thereafter, the plaintiffs tendered a proposed judgment calling for them to receive $1 in nominal damages, which might also have entitled them to attorney's fees. The court instead entered a judgment reciting the verdict as returned by the jury without injunctive relief or the nominal damages.[4]

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[3] The Town of Ramapo has interpreted the exception for home professional offices to allow a clergyman to not only use his home as an office but also to conduct religious services there, provided the number of congregants is not too large. This interpretation has not yet been challenged in court.

We thought at that time that, subject to appeal, the verdict could be left as it was. However, the plaintiffs applied for a substantial amount of costs against the Village, which were awarded in part. (The Village moves to review those costs in the approximate amount of $13,000 but in view of the decision here, no costs can be assessed against the Village.) Under these circumstances, we must address the motion for judgment a matter of law on which we have previously reserved decision and, as indicated, we believe it must be granted since, "without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached." *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970).

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[4] Plaintiffs argue that where a jury finds a civil rights violation it *must* award at least nominal damages of one dollar. In light of the decision on this motion, the issue is moot.

It is ordered that judgement be entered for The Village of Airmont as a matter of law and the costs assessed withdrawn.

SO ORDERED.

Dated: White Plains, N.Y.
March 16, 1994

S/ Gerard L. Goettel
Gerard L. Goettel
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

VILLAGE OF AIRMONT, AIRMONT CIVIC ASSOCIATION, RALPH BRACCO, in his capacity as Mayor of the Village of Airmont, JOHN LAYNE, RAYMOND KANE, CHARLES CALOTTA and RONALD SABO, in their capacities as trustees of the Village of Airmont,

Defendants.
--x

91 Civ. 2550 (GLG)

OPINION and MEMORANDUM OF DECISION

This action, brought by the Government under the Fair Housing Act, Title VIII of the Civil Rights Act of 1968 as amended, 42 U.S.C. §3601 *et seq.*, concerns allegations of anti-Semitism and discrimination against Orthodox and Hasidic[1] Jews. To understand aspects of this decision, some discussion of Judaism, its divisions and practices, is necessary.

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[1] Sometimes spelled Chasidic.

Orthodox Judaism

Judaism is a very old religion. Its practices go back thousands of years. These practices include several worship services during the Jewish Sabbath (called the Shabbos in Yiddish) which commences an hour before sundown on Friday and ends with sundown on Saturday. In order for Jews to pray, they must have a "minyan," a group of ten adult males although sometimes a youth can be substituted.[2] During the Sabbath, there are a number of restrictions on what Orthodox Jews can do. Most pertinent to this case is a prohibition against riding in a vehicle. Orthodox Judaism also imposes strict and complicated dietary laws, requirements concerning dress and hair style for men, and the need to eat only Kosher food. Furthermore, Orthodox Jews often have a strong desire, whenever possible, to educate their children in parochial Jewish schools known as Yeshivas.

Those Jews who follow these ancient and, at least in modern times, inconvenient, practices are referred to as "Orthodox." Within Orthodox Judaism, there are certain sects which may be considered "ultra Orthodox." Most common among these are the Hasidic. Hasidic are known for their distinctive dress style. Although the nature of their dress suggest an ancient origin, in fact, Hasidism developed only a couple of hundred years ago in Poland. While Hasidic dress and liturgy differs from that of Orthodox Jews, the major difference between Hasidic and the Orthodox appears to lie in the position of the Rabbi. An Orthodox Rabbi is engaged by a congregation which retains the power to discharge him. He is a teacher and a spiritual leader, but exercises no direct secular control over his congregation. By contrast, in Hasidic sects, there is a "Grand Rabbi," a position which in some circumstances seems to be family dominated or hereditary. The Grand Rabbi exercises substantially more control over his congregation than an Orthodox Rabbi.

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[2] Judaism, like many ancient religions, appears male oriented. Indeed, if Orthodox Jews have children at home, on Friday night women are expected to be preparing meals rather than attending the worship service.

In the United States, most religious Jews are not Orthodox. They attend either Conservative or Reform temples. So far as the evidence indicated, there is no difference in the religious beliefs of these groups from the Orthodox. However, there are substantial differences with respect to practices and many of the practices of the orthodox mentioned earlier are not followed by Reform and Conservative Jews. Orthodox witnesses in this case referred to the Conservatives and Reform Jews as "not observant" and "as assimilated."[3]

The Orthodox religious practices referred to above seem to be at least as applicable to the Hasidic. The observation of many of these practices is dependent upon the location of other Orthodox Jews and kosher stores and schools in the community. A large urban area will usually have a sufficiently dense population that, although Orthodox are a very distinct minority group, there will often be sufficient number to support a synagogue and related institutions and facilities. In rural and suburban areas, however, where the population density is much lower, numbers can be a problem. There consequently seems to be a tendency for the Orthodox, and in particular the Hasidic, to congregate in communities where their percentage of the population is relatively great.

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[3] In some instances, the differences are rather dramatic. During Orthodox services, the men cannot see the women, who are kept segregated at the back. One Orthodox witness testified that it is improper for an Orthodox male to hear any woman sing other than his wife. In a Reform temple, the congregation is not gender segregated and, indeed, both the Rabbi and the Cantor can be women.

Ramapo

One of these Orthodox/Hasidic centers is the Town of Ramapo in Rockland County. Rockland County may be the smallest county in New York State, but it appears that Ramapo is geographically its largest town.[4] The Town of Ramapo has had a divisive history. Twelve villages have broken away from the Town and incorporated themselves within its borders.[5] Six of these villages broke away during the 1980's. Much of this disenchantment with the Town had to do with its zoning and lack of enforcement thereof. The two last villages to be formed were the Village of Kaser, and exclusively Orthodox/Hasidic village, and the Village of Airmont, which is one of the defendants in this actions.

The major zoning problem in Ramapo was multiple-family housing in areas zoned for single family residences. These violations were purportedly common throughout the 1980's and related mostly to the Hasidic population.[6] On

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[4] However, the western half of the town is occupied by a state park and has few inhabitants.

[5] In an effort to stop the village formation movement, the Town of Ramapo passed legislation giving its supervisor greater power to invalidate applications for village incorporation. This legislation, however, was ultimately thrown out by the New York courts.

[6] The Government argues that there is no particular basis for believing that Hasidic families violate residential zoning laws, and the defendants offered no evidence to explain why they believed this occurs

October 18, 1986, the Town of Ramapo rezoned to create a multiple-family housing zone in the central Mosey area.

Another zoning problem developed in the Town during the mid 1980's. When the Town, which had always had a substantial Jewish population, experienced a dramatic increase in the number of Orthodox and Hasidic residents. Numerous small "shteebles" were formed as places of worship in Rabbis' homes without obtaining a certificate of occupancy or any zoning approval. Nearby residents complained about their operation. The Town was under substantial pressure to legitimize the operation of these shteebles. Rather than face the problem directly, the Ramapo Town government decided that a political expedient would be to interpret its existing exception to the zoning laws for home professional offices to allow a clergyman to regularly conduct religious services in his home as an accessory use. This interpretation of the zoning code was not popular with those non-Orthodox residents living near them.

There appear to be several reasons for the popularity of shteebles. Or is that, since the Orthodox cannot ride on the Sabbath, they prefer having their place of worship as near to their homes as possible. However, even in instances where a traditional free-standing synagogue (or "shul") is within reasonable walking distance, the congregants of a particular rabbi often prefer continuing to worship with him at his home. Also, the cost per congregant is less to support a shteeble than a shul.

Airmont Civic Association

The Airmont Civic Association ("Civic Association") was formed about 1983 by James Filenbaum, a local attorney,

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among Hasidics.

who was interested in being Mayor of the Village of Airmont should it be formed. While the Civic Association had other mundane interests, it began supporting the village movement about 1984. However, in that same year Filenbaum decided to run for office in the Town of Ramapo, and the Civic Association became inactive for a couple of years.

In mid-1986, Jill Tucci and several other women who were members of the Island Lake Swim Club, became dissatisfied with the services they received from the Town of Ramapo. They met informally to discuss the formation of a civic group. Filenbaum, who had lost his bid for public office in the Town, also attended. When the women indicated interest in forming a civic association, Filenbaum told them he already had one and, indeed, was the President of it. During 1986, this group met informally and started supporting the formation of the Village of Airmont. Around the same time, Maureen Kendrick (formerly a defendant in this action in her capacity as Mayor of Airmont) and her cousin, defendant John Layne, became members. The following year, defendant Raymond Kane also joined the Civic Association, and the small core group came to include Stan Dublet, Gay Caroll, Paul Berliner, and Marianne Cucolo.

During 1986, while Ramapo was changing its zoning laws to allow more multiple-family housing in nearby central Monsey, various Civic Association members circulated petitions for the incorporation of a village. Filenbaum continued as President of the Civic Association until February 11, 1988, when he was replaced by Maureen Kendrick. During this period of time, besides assisting the village formation, the Civic Association participated in a number of other local affairs regarding such issues as a senior citizen complex, traffic flow on Route 59, drainage problems, waste collection, a home for the disabled, and utilization of a closed school.

The Village of Airmont

By 1986, the Civic Association had a map drawn for the proposed boundaries of the Village of Airmont. Since the area which was to become Airmont already had villages to the east and west and the State of New Jersey to the south, the only option in selecting the boundaries was what to use as the northern boundary. Initially, the Civic Association considered using a road which angled across the northeast corner of what later became the Village of Airmont and would have eliminated the areas which gave rise to the litigations discussed below. Ultimately, however, the Civic Association selected the New York Thruway as the northern boundary, since it was a natural geographic separation from the rest of Ramapo.[7]

One of the prime reasons for the Civic Association's desire to form a village was the power of villages to create and interpret their own zoning code pursuant to New York Village Law § 7-700 *et seq*. On April 16, 1987, petitions to incorporate the Village were approved at a public hearing in the Town of Ramapo. No opposition was voiced at the hearing. However, a month later an Orthodox resident and real estate developer named Lefkowitz brought and Article 78 petition challenging, on technical grounds, the adequacy of the petition to incorporate. Although the challenge was not successful, by virtue of its filing and the taking of appeals, Lefkowitz prevented the Village from going into operation for a couple of years.

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[7] A small sliver on the western border was omitted when the residents indicated they preferred not being a part of the Village. In addition, a cemetery area on the New Jersey boarder also had to be eliminated to keep the Village within the maximum size permitted by state law for villages.

When the *Lefkowitz* litigation was finally terminated, the formation of the Village was put to a vote by referendum, which occurred on January 30, 1989. Although some residents opposed the Village as adding an additional layer of bureaucracy and taxes, and most of the few Orthodox residents apparently voted against it, the referendum nevertheless succeeded by a three to one margin. Again, however, the Village was stymied by another Article 78 proceeding challenging the manner in which the referendum was conducted. This was brought by Mayor Schreiber, an Orthodox real estate developer and the contractor for the Friedman synagogue expansion which is discussed infra. The litigation was supported by various persons who subsequently became plaintiffs in the private litigation also described infra. The proceeding was ultimately dismissed when it developed that Schreiber lacked standing since he was not a registered voter.[8] Nevertheless, with appeals, the litigation prevented the Village from accomplishing the ministerial acts, which would commence its operation, for a period of almost two and a half years.

The Formation of Orthodox Congregations in Northeast Airmont

In the fall of 1986, a real estate developer named Michael Tauber purchased property in the northeast area of what is now Airmont and filed plot plans for two sections that later became known as Park Avenue Estates and Joy Acres. This occurred at about the same time as the Town of Ramapo change its zoning laws to permit a zone for multiple-family housing a little north of the area that subsequently became Airmont. He advertised his development in Orthodox Jewish publications in New York as the construction of a "Torah Community." However, actual construction of houses did not commence for another year or two. During that period of time, another developer purchased property slightly to the south of Park Avenue Estates and Joy Acres which has never been developed. During 1988 and the first half of 1989, Orthodox and Hasidic Jews who later became plaintiffs in a private plaintiffs' suit (hereafter referred to as the "Sternberg litigation") all bought houses and moved into the first section of the Tauber development called Park Avenue Estates. The early residents walked a mile or more to a home synagogue north of the New York Thruway. They told similar stories of harassment of an anti-Semite nature during their walk from passing anonymous motorists.[9]

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[8] The defendants in this action contend that he was not even a citizen, but this collateral issue was not proved.

During the latter part of 1989, Rabbi Yitzchok Leblanc Sternberg (who is Hasidic) organized a congregation of Orthodox Jews in the Park Avenue Estates area. He thereafter made application to the Town of Ramapo to use his home as a house of worship pursuant to the Ramapo interpretation of a clergyman's use of a home professional office. This application came on to be heard by the Town of Ramapo Planning Board on November 2, 1989. A heated hearing was conducted with a number of Airmont residents arguing against granting the application and a number of the rabbi's congregants arguing in favor of it. Among those who spoke against the application were Robert Fletcher and Maureen Kendrick. (Kendrick lived quite close to Park Avenue Estates.) The Planning Board initially rejected the application but then granted it upon Rabbi Sternberg's acceptance of a 40 person limitation on the number of congregants. (He and his attorney were not pleased with this limitation but felt it was the best they could do at the time, under the circumstances.)

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[9] These events occurred primarily on Saddle River Road, a busy street running from New Jersey into Central Monsey. The road is the dividing line between Airmont and the Village to the east. There was no proof that the harassers were residents of Airmont.

Shortly after Planning Board approval, defendant Raymond Kane and other members of the Civic Association met with Town of Ramapo officials to object to the home professional office interpretation that could allow as many as 40 congregants to assemble regularly at a home. The Ramapo officials claimed that this interpretation was supported by legislative history in that regard. Leaders of the Civic Association argued that applications of this sort should not be considered by the Town but should be withheld for consideration by the Village of Airmont once it was allowed to commence operations.

On the same night that the Sternberg application was heard, Rabbi Chaim Friedman also made a preliminary application for a zoning variance. His congregation lived slightly to the west of Park Avenue Estates and Joy Acres and was comprised of a small group of Orthodox Jews who had difficulty in obtaining a permanent rabbi. They had been congregating in various homes and moving their place of worship every month or so. The congregation had attracted Friedman to come up from Brooklyn with the promise that they would support the building of a synagogue. The synagogue which Friedman planned was to be built as an adjunct to his home, but because it was to be a fairly substantial structure, it was not being submitted under the home professional office exception. The Ramapo zoning code provides that free standing houses of worship in that area must be built on lots of two acres. However, Friedman plans were for a piece of property that was slightly below two acres and required a number of other bulk zoning variances.

In this regard, it is worth noting that a few months earlier the Ramapo Zoning Board of Appeals had approved the establishment of a house of worship for 120 congregants in a residential area on a lot of only two-thirds of an acre in an area a couple of miles north of the New York Thruway. That application was bitterly opposed by the residents of that area, none of whom came from Airmont or belonged to the Civic Association. Despite their opposition, the application was approved and the synagogue was built. A next door neighbor to the synagogue testified at some length concerning the disruptions and unpleasantness caused by having the synagogue next door, indicating that it was not so much the worship services on Saturday as it was the numerous affairs held on other days when the attendants could drive, including band music playing into the night and firecrackers going off on a particular Holy Day.

Civic Association members unsuccessfully opposed the Friedman application, but their opposition may have delayed its approval, which did not finally come until January 15, 1991. Later that year, James Montone brought an Article 78 proceeding challenging approval of the Friedman synagogue. It was not until May 1992 that the Town then gave a final approval to Friedman's synagogue. However, they conditioned it upon Friedman obtaining approval or a variance from the New York State Board of Fire and Safety Codes. Friedman did not seek such approval at that time and, indeed, has done so only recently. Instead, as will be noted below, he commenced a lawsuit against the Village and certain individual defendants.[10] Friedman argues that he should not *be* required to get State approval since appending a synagogue to a home does not constitute a "dual use" so that there should not be safety factors imposed. He blames this Town action on certain individual defendants.

Following the Planning Board approval of Sternberg's applications some of the neighbors and James Montone posted themselves outside Rabbi Sternberg's home to count the number of congregants on occasion. The Sternberg congregation was outraged by this. While these proceedings were no doubt annoying to Rabbi Sternberg and his congregation, they did not in any way impair the conducting of services or other proceedings by to Rabbi at the Sternberg home.

Although the Sternberg application had been approved by the Town of Ramapo in November 1989 and his shteeble has been in operation ever since, Sternberg's variance was challenged in two Article 78 proceedings supported and paid for by the Civic Association. The first Article 78 proceeding was successful to the extent that the New York State Supreme Court revoked the approval and remanded the matter to the Planning Board for further findings. Following the second approval, [11] another Article 78 proceeding was commenced on slightly different grounds and it, too, resulted in a reversal of the approval and remanding for further findings. Finally, on November 12th, 1991, the Town of Ramapo Planning Board approved the application for a third tome. While Mayor Kendrick of the Village, which by this point had commenced operation, discussed a third Article 78 proceeding, it was never brought.[12]

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[10] Rabbi Friedman and his congregation have had a number of other problems. Before Friedman arrived, two earlier rabbis had failed to develop the congregation the way they had hoped. Friedman himself, in several of his earlier employments, had been unsuccessful in developing religious oriented enterprises due to financial problems. In his activities as rabbi of the present congregation, he had encouraged the donation of used cars to his synagogue (allowing the donors to get charitable deductions based on their belief as to the value of the cars) with Friedman reselling the cars to dealers for whatever he could obtain for them. The money obtained was to be used for his synagogue. Unfortunately, this activity required the storing of numerous cars on his premises (we gather that the donations came from not only his congregants but also from Orthodox Jews from other areas) with the result that he was served with zoning violation notices, compelled to pay a fine, and required to cease his operations.

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[11] The petitioner in that proceeding was subject to a boycott of his car sales business as a result of his bringing the action and, consequently, did not pursue it further. The second Article 78 proceeding was brought by other local residents.

[12] The curious thing about these Article 78 proceedings was that they were brought on purely technical zoning grounds. They never raised the question of whether a home synagogue could properly be approved as an adjunct to a home professional office.

Changes in the Airmont Civic Association

The Civic Association's efforts to incorporate a village had taken it to its final stages only to be thwarted by the *Schreiber* litigation. Between 1986 and 1989, the core membership of the Airmont Civic Association changed somewhat and some of the original core group dropped out. The original concern about multi-family housing in residential areas was coming to be overshadowed by a concern about home synagogues. However, with the emergence of the Rabbi Friedman application, which did not rely on the Ramapo interpretation of the home professional office use, a new anti-neighborhood synagogue feeling started to develop. Defendant Robert Fletcher became active in the Civic Association in the middle of 1989. At the end of the year, he campaigned to be on the Board of Directors and after the Directors were elected and chose officers, campaigned to be President. (This apparently was the first time there had been any such internal partisan dispute over officers.) Fletcher defeated defendant Raymond Kane, who was the selected as Vice-President by acclaim. Other officers were appointed by acclamation as well.

Fletcher is an extremely outspoken person and quite politically active. He was joined in the Association by a close political ally, Nicholas Vertullo, who was later appointed to the board. Along with James Montone, the three vigorously opposed converting residences into houses of worship even on two acre plots. Other remaining members of the old core group disagreed with this approach. They also disliked Fletcher's domineering leadership style. Efforts by Kane to have Fletcher soften his approach were unsuccessful. In early 1990, several of the old guard of the Civic Association, such as Filenbaum, Dublet and Caroll, resigned. They joined a newly formed group with the acronym "action" (Airmont Citizens to Improve Our

Neighborhood). This group also favored strict enforcement or zoning laws but did not necessarily view the Friedman synagogue as being a violation of the zoning laws. At least some of the departing persons had begun to suspect that Fletcher's vehement opposition to residential houses of worship was not caused solely by the usual zoning concerns, but had an anti-Orthodox underlay to it.

On February 8, 1990, the Town Zoning Board of Appeals granted Friedman the variances he had requested over the objections of some Civic Association leaders. However, as indicated earlier, the problems with the synagogue were not resolved at that time and were further complicated by Montone's filing of an Article 78 proceeding in July 1991. Starting in mid-1990, the Civic Association became somewhat inactive, although it revived in early 1991 when the *Schreiber* litigating ended and the election of village officials became possible. The Civic Association ran a slate of candidates as did the ACTION group and another independent group.

Formation of the Village

On April 10. 1991, the Secretary of State of New York State signed the certificate of incorporation for the Village of Airmont. On May 16, 1991, the elections for the Board of Trustees of the Village of Airmont were held with the Civic Association slate getting approximately half the vote and the other two tickets splitting the remainder. Maureen Kendrick was elected as Mayor; Fletcher, Layne, Vertullo and Marianne Cucolo were elected as Trustees. Defendant Raymond Kane, who had run on one of the other tickets, was defeated. No sooner was the Civic Association slate elected than they had serious fallings out among themselves. Like most small villages, services were largely contracted out, and the major consideration for the new village was the zoning law, which had been a principal reason for its formation. Fletcher and Vertullo favored the adoption of the Ramapo Zoning Code in its entirety, although they obviously did not intend for Ramapo's home professional office exception interpretation to be adopted in the Village. The other Board members believed that a full study should be made by professional zoning planners and ultimately a commission to proceed in that fashion was formed. Consequently, the Village had no zoning code until 1993.

When the Zoning Commission, with the help of its professional planners, completed their work, a public hearing was held to consider the new zoning code. No one appeared at that hearing to object to the code or to request additional provisions assisting the practice of religion by Orthodox Jewish residents. Consequently, the Village Board adopted the zoning code on January 11, 1993.

The new code is basically similar to the Ramapo Zoning Code. A couple of minor changes were made in the home professional office provision, which arguably could be taken as a signal for a different interpretation but do not by their terms require it. A five member Planning Board was appointed, which included James Montone. A seven member Zoning Board of Appeals was appointed, including former Civic Association leader Jill Tucci, and a brother-in-law of Raymond Kane. To date, neither the Planning Board nor the Zoning Board has had any applications with respect to synagogues. The present zoning code provides for neighborhood places of worship in R15 zones with no requirement of two acres. However, the R15 zones in Airmont are fairly small. Generally speaking, other than R15 zones, a two acre lot is required, but there are numerous vacant two acre lots in the Village of Airmont. Specifically, in Joy Acres, which was taken over by a builder named Joseph Herskowitz from Michael Tauber, there are two adjacent lots which Herskowitz has offered to sell at cost for the preparation of a free-standing synagogue and which he believes meet all zoning requirements.[13]

The Lawsuits

On April 12, 1991, the Sternberg plaintiffs filed a lawsuit naming the Rabbi, his wife, and a couple of congregants, as well as the incorporated Park Avenue Synagogue, as plaintiffs. They sued under the Fair Housing Act and a number of civil rights statutes, claiming constitutional violations. They sued the then-Mayor and four Trustees, as well as a number of other Civic Association members, the Supervisor of the Town of Ramapo, and the Town of Ramapo.[14] The complaint was later amended to drop all of the Civic Association defendants who were not Village Trustees except for Raymond Kane and Paul Berliner (who some time later was dropped from the case). On December 17, 1991, the United States filed this lawsuit solely under the Fair Housing Act against the Village of Airmont and its then-Mayor and Trustees. (The complaint has been amended to name the present officials in their official capacities.) The private plaintiffs' suit and the Government's suit were consolidated for discovery purposes and were ultimately tried together, with the Sternberg suit being presented to a jury. Following a seven week trial, the jury deliberated for a week. In June of 1992, Rabbi Friedman and some of his adherents filed a separate lawsuit, which is still in the discovery stage.

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[13] One of the plaintiffs' witnesses indicated that he believed the lots to be too steeply inclined to be satisfactory for the building of such a synagogue.

[14] This court dismissed the case against the Supervisor and the Town of Ramapo finding that they had no discretion in the approval of the incorporation petition.

Post-Litigation Developments

During the two and one-half years that elapsed from the filing of the first suits to the trial, few new developments of any consequence occurred. The initial Village Board was elected to staggered terms, and therefore, two Trustee positions were up for election in only one year. In the election held on March 17, 1992, John Layne was re-elected, defeating defendant Ralph Bracco, and Nicholas Vertullo lost to Raymond Kane. The following month, Marianne Cucolo, whose term had not expired, resigned from the Village Board, which then appointed Mary Ann Lawler to fill out her term. (Lawler had not been a Civic Association member.)

In March 1993, the elections for Mayor and the two vacant Trustee positions were held. Maureen Kenderick and May Ann Lawler were defeated. Robert Fletcher did not run for re-election. Ralph Bracco was elected Mayor and Charles Calotta and Ronald Sabo were elected to the two Trustee vacancies. The political split which developed between the Fletcher group and the Kendrick Kane and Layne group continued but in this election the candidates supported by Fletcher prevailed. The Airmont Civic Association, which had become splintered and inactive, held its last meeting in the middle of 1992. The Civic Association had been named as a defendant in all of the three litigations. Initially, it appeared by counsel but when counsel withdrew (apparently from not being paid) a default was entered against the Civic Association.[15]

The plaintiffs contend that the Village of Airmont has developed a reputation as a community hostile to Orthodox and Hasidic Jews. If it has, it is largely the result of these three lawsuits brought against it by the various plaintiffs and the extensive publicity plaintiffs had intentionally generated. Nothing in the evidence presented at trial indicated that there was any substantial difference between the people of Airmont and other Ramapo residents who spearheaded separate movements to incorporate villages within the Town.[16] The founders of other villages also expressed dissatisfaction with the Town's lax zoning years prior to Sternberg's application.

With respect to synagogues, nothing other than the passing of the zoning code mentioned above has occurred which even remotely bears on the issue. Rabbi Sternberg's congregation has continued to meet in the same fashion as before the village was formed, as had Rabbi Friedman's. Rabbi Friedman failed until recently to even apply for State Fire and Building Code approval. It appears that his congregation has a financial problem in building a synagogue of the size already approved by the Town of Ramapo. While they have raised substantial sums of money, they have devoted it to their litigation with the avowed hope of obtaining a multi-million dollar judgment which will more than finance any type of synagogue.

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[15] So far as the evidence showed, the Civic Association, a not-for-profit organization, owned no property and left no assets. The last officers elected resigned about a year and a half ago and the organization is now either non-existent or totally dormant.

[16] There is, of course, the obvious religious difference from the people of the two villages which are exclusively Orthodox/Hasidic (Kaser and New Square). In this religious sense, they differ also from what is left in the unincorporated occupied parts of the Town of Ramapo, which are heavily Jewish and substantially Orthodox/Hasidic.

While the Friedman congregation has lost some members, the evidence did not establish that they left in any great number because of the existence of the Village of Airmont. Meanwhile, in the Park Avenue Estates/Joy Acres area, numerous Orthodox families have moved in. Overall, the evidence indicated that the number of Orthodox families has increased since the Village began operating. The earlier housing developments are virtually sold out.[17] Between the Park Avenue Estates/Joy Acres developments and the area occupied by the Friedman congregants there appear to be enough congregants (sixty or more families) to operate a free-standing synagogue on the two plots offered by Herskowitz in Joy Acres. That location is within reasonable walking distance of all of these people but for various reasons, including their adherence to two different rabbis, there has been no movement in that direction.

Since its formation, no efforts have been made by the Village to interfere with the activities of the Sternberg congregation or the Friedman congregation. In addition, there are other groups in the area who have been meeting and praying without a rabbi and with no building or zoning applications being made.[18] The Village has not challenged these activities.

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[17] There is, however, to the immediate south another substantial development which has not begun construction which is owned by an Orthodox Jewish builder who is being assisted by a different Orthodox Rabbi.

[18] Under Jewish law, it is necessary to have ten or more adult males to hold a prayer service but there is no requirement for the

The plaintiffs argue that it is merely the spotlight of these three litigations which has inhibited action.

The Jury Verdict in the Sternberg Litigation

Following its week of deliberation (the longest in the civil case that this court can recall), the jury returned what appeared to be a compromise verdict. The jury found in favor of all the individual defendants, but found that the Village violated the Fair Housing Act and the right of the plaintiffs to freedom of religion. However, they awarded no damages whatever, not even $1 nominal damages on the Civil Rights claim. In addition, the jury found that the majority of those voting to form the Village were not moved by anti-Orthodox religious bias. (The principal injunctive relief sought by the private plaintiffs was the dissolution of the Village.)

The Government's Application for Injunctive Relief

In arguing that injunctive relief should be directed against the Village and its current Mayor and Trustees, the Government acknowledges that it cannot point to any significant actions taken by them. However, the Government argues, in effect, that the Village was conceived in sin and cannot escape the taint of its illegitimate birth.

The Government arrives at its rather tenuous arguments by stringing together a series of earlier authorities. It argues first that elected officials cannot conceal their motivations by clever or subtle behavior, citing *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1985). They cite *Casa Marie, Inc. vs Superior Court of Puertor Rico for the District*

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presence of a rabbi, although such is obviously desirable when possible.

of Arecibo, 988 F.2d 252, 257 n.6 (1st Cir. 1993) for the proposition that the discriminatory use of zoning laws is contrary to the Fair Housing Act.[19] But, concerning home synagogues, there has been no substantial change from the zoning laws of Ramapo to Airmont and no applications even presented to its Planning Board. The Government notes that if a defendant ceases illegal conduct after the filing of a lawsuit challenging the conduct that the cessation of the illegality does not prevent the imposition of injunctive relief. *United States v Oregon Medical Society*, 343 U.S. 326, 333 (1952). That is undoubtedly true. However, it assumes prior illegal conduct which, from the standpoint of the Village and its Trustees in their official capacity, has not been established.

Faced with this problem, the Government resorts to the claim that "an injunction may issue to prevent future wrong, although no right has yet been violated. "citing *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928). That language does appear in *Swift* but in a context totally different from this. In that case, the Government had sued Sift & Co. under the antitrust laws. The parties thereafter entered into a consent decree providing that the court could entertain, at any time thereafter, any application which the parties might make with respect to it. Four years later the defendant moved to vacate the consent decree, arguing that there had been no case or controversy sufficient to afford the court jurisdiction over the matter under Section 2, Article 3 of the Constitution when the consent decree was entered. It was in response to that argument that the court held that an injunction could issue to prevent future wrong although no right had yet been violated. That principle has nothing to do with the claims of the Government against the Village of Airmont which never entered into any consent decree.

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[19] However, 42 U.S.C. § 3607(b)(1) allows restrictions on the maximum number of occupants permitted to occupy a dwelling which was the aspect of the zoning laws which first gave rise to the Village's concerns.

Viewing the evidence in the light most favorable to the Government, we can foresee that the Planning Board and the Zoning Board of Appeals (to the extent the matter might be submitted to it) will not adopt the Ramapo interpretation of the home professional office exception.[20] It may also be true that the absence of actions by the Village and its officials adverse to Orthodox and Hasidic Jewish interests has been due in part to the existence of the three lawsuits. However, it may equally be true that, having learned the extreme costs of litigation from these lawsuits, the Village will have no interest in taking actions against residential synagogues or doing anything else which has an adverse effect on the availability of housing for Orthodox or Hasidic Jews. Clearly, if there is any action taken in the future which violates their rights, the United States Government and other plaintiffs will not be timorous about suing. Consequently, we see no basis or need for injunctive relief. Moreover, were we to grant injunctive relief, it would not be in the manner requested by the Government.

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[20] There are two contradictory arguments that can be made on that issue. One is that since the code provisions are quite similar, it was the intent of the Village Board that it be interpreted in similar fashion to that of the Town of Ramapo. The contrary argument would be that, since many of the Village Trustees had clearly voiced their opposition to the Ramapo interpretation and added a few variations to the provision, including one which stated that actions allowed under the home professional office use should not be those which would change the character of the neighborhood, the legislative intent was to the contrary.

The Government's requests fall into three categories. The first part would enjoin the defendants from denying the constitutional and legal rights of persons on account of their religion. Such injunctive relief is unnecessary since it would be enjoining acts which are already illegal. The second portion of their request for injunctive relief concerns zoning code changes which are drafted in such a manner as to be obviously of benefit only to Orthodox Jews.[21] If the court were to draft zoning code changes with respect to residential houses of worship, the changes would not be confined to those favorable only to the Orthodox.

Finally, the third portion of the request seeks "other affirmative relief" which includes a requirement that the Village notify "in advance, counsel for the United States of all meeting of the Village planning Board and Village Zoning Board of Appeals and ... provide copies of the agendas of those meetings to counsel for the United States in advance of the meetings." The overwhelming majority of matters which come before Planning and Zoning Boards have nothing whatever to do with the rights of minority religious groups. To impose such a restriction would be egregious overkill. In addition, the

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[21] For example, the Government proposes a definition of a residential place of worship in the following language:

> An area located within a residence that is used for the conducting of religious services. It is the intent of this Local Law that the presence of pedestrians walking to and from religious services at a Residential Place of Worship shall not in and of itself Place of Worship shall not in and of itself constitute a change in the residential character of the neighborhood.

Government seeks that the Village remove James Montone from his position as a member of the Village Planning Board "effective immediately." Mr. Montone is not a party to this litigation. Indeed, he was not even a witness in this case. To invoke such a remedy against him without notice or an opportunity to be heard would clearly be in violation of his rights.

The zoning laws are, of course, required to be accommodating of religious exercises. Moreover, if the zoning laws make the exercise of religion inaccessible to practitioners they may amount to a violation of First Amendment rights. *Islamic Center of Miss. v. Starkville, Miss.*, 840 F.2d 293 (5th Cir. 1988). However, the Government's request for injunctive relief would eliminate any restriction upon home synagogues, which could literally be opened in every Orthodox house. First Amendment rights are not so all consuming, and the common good requires that some religious practices must yield. *United States v. Lee*, 455 U.S. 252, 258-59 (1982). The free exercise of religion does not give worshipers a veto over government programs or regulations which do not *prohibit* free exercise of religion. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485, U.S. 439, 452 (1987). A zoning code may require that a proposed church show that its use is compatible with the neighborhood, will not be detrimental to the health, safety and general welfare of the residents, and that the use will otherwise comply with the zoning code or a city's master plan. There is a strong interest in maintaining integrity of zoning schemes providing that they do not unduly impair the practice of religion. *Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221 (9th Cir. 1990).[22]

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[22] That case also held that the exercise of free speech rights by homeowner and neighborhood associations to oppose zoning

Of course, a zoning regulation which has as its purpose the inhibition of the practice of religion may be unconstitutional on its face. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S.Ct. 2217 (1993), 61 U.S.L.W. 4587. However, requirements limiting the construction of a house of worship do not necessarily restrict the practice of religion, which may be carried on in other locations. *Messiah Baptist Church v. County of Jefferson, Colo.*, 859 F.2d 820, 825 (105th Cir. 1988) (noting that "building and owning a church is a desirable accessory of worship, not a fundamental tenet of the congregation religious beliefs"). In this case there is evidence that the congregants have continued to assemble and worship even without approval of the Friedman synagogue and at other locations.

Appellate courts have specifically upheld zoning codes which prohibited the operation of Orthodox Jewish home synagogues which were located in a single family district. *Grosz v. City of Miami Beach, Fla.*, 721 F.2d 729, 741 (11th Cir. 19830. There, the court balanced the cost to the desired religious activity of conducting services in compliance with applicable zoning restrictions or relocating to a suitable zoned district. After noting that the zoning requirements were similar to regulations of place and manner of religious expression, which are permissible so long as the regulation is reasonable and there is no content classification, the court found the balancing test to favor the government. In *Grosz*, one-half of the city's residential zones were available for religious institutions. However, in other cases, zoning ordinances prohibiting construction of churches in residential neighborhoods have been upheld even though as little as 10% of the city was available for

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permits does not comprise a conspiracy - a major claim of the private plaintiff in the Sternberg suit, which was rejected by the jury.

religious institutions. *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303 (6th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983). (The Court in that case also noted that the building of a church was not a fundamental tenet of the religion ordinance did not prevent the practice of religion, but merely created an indirect financial burden.)

The desires of Orthodox Jews in the Town of Ramapo have been before this court in the past. In *Weiss v. Willow Tree Civic Ass'n*, 467 F. Supp. 803 (S.D.N.Y. 1979), the late Judge Edward Weinfeld described the case as being essentially a local zoning dispute despite the variety of claims charging violation of the plaintiffs' federal statutory and constitutional rights. In *Weiss*, the plaintiffs were a congregation of Hasidic Jews who desired to establish a housing development on land in the Town of Ramapo and claimed, much as do the private plaintiffs here, that a civic association and its members conspired and acted to harass and delay their application to the zoning authorities to permit the proposed housing development. The complaint alleged no state or municipal activity and all of the defendants were private parties -- which was the status of this case to the extent that it concerns events prior to the formation and operation of the Village of Airmont. As here, it was claimed that the Civic Association and its members acted jointly with the Town Supervisor, Herbert Reisman (who was originally a defendant in this action) to deprive the plaintiffs of their constitutional rights in a manner similar to that set forth here and dismissed earlier by the Court.

In addition finding an absence of state action, Judge Weinfeld found

> other considerations of more compelling force require dismissal of the complaint. A fair reading of [the

> complaint's] allegations makes it clear that plaintiffs' claims under Sections 1982, 1983 and 1985(3) are inextricably bound up with the defendants' exercise of First Amendment rights of assembly, petition and association.

467 F. Supp at 816. As in this case, the plaintiffs argued that the First Amendment rights of the defendants must be ignored since their real motivation was to pressure town officials and harass the plaintiffs. Judge Weinfeld rejected this argument stating they the protection of the First Amendment

> does not depend on "motivation", it depends on the nature of defendants' conduct. Defendants' activities described in the complaint fall squarely under the protection of the First Amendment's guarantees of citizens' rights "peaceably to assemble and to petition the Government for a redress of grievances." (Footnote omitted.)

He concluded his decision holding:

> Plaintiffs by their pleading have sought to transmute a zoning dispute, still pending, into assorted claims of violation of federally protected constitutional rights. To uphold the complaint would, as Judge Waterman stated in a similar context, "be inviting every party to a state proceeding angered at delay to file a complaint in this court reciting the history of his state case and concluding with a general allegation of conspiracy." Such was not the intendment or purpose of the civil rights acts. (Footnote omitted.)

467 F. Supp. At 818.

Ramapo's problems resurfaced in 1984 in the case of *Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo*, 593 F. Supp. 655 (1984). There, Judge Haight denied an Orthodox congregation's request for a preliminary injunction enjoining enforcement of zoning laws which interfered with the operation of its religious nursery school on a synagogue's premises. In a case similar to Rabbi Friedman's situation he held:

> The Court's task, accordingly, is to balance "the cost to the government of altering its activity to allow the religious interest imposed by the government activity." *Grosz v. City of Miami Beach, Florida*, 721 F.2d 729, 734 (11th Cir. 1983).
>
> * * * *
>
> The task is less delicate, however, where, as here, the law simply regulates a secular activity and, as applied to plaintiff, operates so as to make more practically difficult the practice of its religion. *Id.* In such cases, the burden on religion must be viewed as relatively less onerous.
>
> * * * *
>
> Necessary to an assessment of the Town of Ramapo's interest in enforcing its zoning requirements is an understanding of exactly what regulations are involved. This has been, at least from the Court's perspective, an area of considerable confusion from the inception of this litigation. Much of the

controversy between the litigants has evolved into a dispute over the nature of the regulations the Town seeks to impose and their applicability to plaintiff's premises. Plaintiff has consistently sought to characterize the compliance with relatively technical aspects of its zoning law, such as the control of "traffic patterns ... or congestion in the area" (Pl. Br. At 12) or "requirements relating to a setback" (Pl. Reply Br. of Feb. 24, 1984, at 4), and has argued that such concerns are minimal as applied to its small congregation, none of whose members are permitted to drive an automobile to services on the Jewish Sabbath or religious holidays. In support of its argument, plaintiff cites to cases holding that a proposed religious use of property should be accommodated unless it is "convincingly shown that it will have a direct and immediate adverse effect upon the health, safety or welfare of the community." *Holy Spirit Association for Unification of World Christianity v. Rosenfeld*, 91 A.D.2d 190, 458 N.Y.S.2d 920, 922 (2d Dept. 1983), quoting *Matter of Westchester Reform Temple v. Brown*, 22 N.Y.2d 488, 494, 293 N.Y.S.2d 297, 302, 239 N.E.2d 891, 895 (1968).

Plaintiff's argument depends, obviously, on the accuracy of its characterization of the ordinances involved. Defendant vigorously disputes this characterization and argues that health, welfare, and safety concerns are at issue here and represent a governmental interest sufficiently compelling to justify enforcement of its zoning law.

* * * *

At a conference held before this Court, counsel for defendant agreed that use of the premises as a synagogue is a use permitted by right. However, although plaintiff would not be denied certificate of occupancy because of its intended use of the premises, it would nevertheless be subject to compliance with the regulations set forth in the New York State Uniform Fire Prevention and Building Code.

* * * *

With respect to the fire standards applicable to the building if used as a synagogue, nursery school, and residence, the governing statute is the New York State Uniform Fire Prevention and Building Code ("the Code"). (Wren Aff. of Feb. 1, 1984, ¶3). According to defendant, because plaintiff's building was initially constructed as a one-family dwelling, it is deficient in number of way with respect to the mixed use contemplated. Citing to the Code, Assistant Building Inspector Wren avers that plaintiff would be required to submit a set of professionally prepared construction drawings demonstrating compliance with various fire-safety-related structural features, including, but not limited to, a fire-resistant wall between the garage and synagogue (id., ¶5); a proper fire enclosure for the building's heating equipment (id., ¶6); an approved means of egress from the synagogue and school area (id., ¶7); and private emergency lighting, portable fire extinguishers, smoke and fire detectors, and a fire alarm system connected to

> Rockland County Communications Center (id., ¶8). Plaintiff would also, according to Wren, be required to submit to the Town a fire evacuation plan and to conduct regularly scheduled fire drills.
>
> If, in fact, these are the regulations applicable to plaintiff's premises, I would be loathe to grant the injunctive relief plaintiff seeks in the face of alleged non-compliance with unquestionably important safety requirements.
>
> * * * *
>
> Having determined that certain fire and safety-related regulations are, contrary to plaintiff's view, at issue here, I must conclude that public safety, health and welfare is at least one objective underlying challenged ordinance. Such an interest is of a magnitude to justify even substantial inroads on the free exercise of religion and clearly outweighs the indirect and seemingly remediable burden on plaintiff's religious beliefs is absolute, the freedom to engage in religious practices is not .... [Such] practices are subject to regulation for the protection of society." *Rosenfeld, supra*, 458 N.Y.S.2d at 925.

593 F. Supp. 659-63.

This court adopts Judge Haight's reasoning, particularly as it applies to the Friedman synagogue. Consequently, for all of the foregoing reasons, the Government's application for injunctive relief against the Village and its Trustee is in all respects denied. The Government's action against the defendants is dismissed. The clerk will enter judgment on behalf of the defendants.

SO ORDERED.

Dated: White Plains, N.Y.
December 15, 1993

S/Gerard L. Goettel
Gerard L. Goettel
U.S.D.J.

(3)

Supreme Court, U.S.
FILED
MAR 27 1996
CLERK

No. 95-1381

IN THE

Supreme Court Of The United States

October Term, 1995

THE VILLAGE OF AIRMONT, and its Municipal Officers,
Petitioners,

v.

RABBI YITZCHOK LEBLANC-STERNBERG, CHANIE LEBLANC-STERNBERG, FRED WALFISH, LEWIS KAMMAN, PARK AVENUE SYNAGOGUE, INC., and UNITED STATES OF AMERICA,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION FOR RABBI YITZCHOK LEBLANC-STERNBERG, CHANIE LEBLANC-STERNBERG, FRED WALFISH, LEWIS KAMMAN, AND PARK AVENUE SYNAGOGUE, INC., RESPONDENTS

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March 27, 1996

Balmar Legal Publishing, Washington, D.C. (202) 682-9800

29 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in deciding that the Petitioner's zoning code, the object of which was to target for discrimination the home worship practices of Orthodox Jews, violated the Free Exercise of Religion and Fair Housing Act rights of the Respondents.
2. Whether the Respondents have standing to bring their case, and was such case ripe for adjudication, where the Court of Appeals found that Petitioner's zoning code would likely be applied in a discriminatory manner.

LIST OF PARTIES

The parties are accurately stated in the caption of this case. Respondent Park Avenue Synagogue, Inc., is a non-profit and non-stock corporation that has no parent or subsidiary companies.

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IN THE

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THE VILLAGE OF AIRMONT, and its Municipal Officers,
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OPINIONS BELOW

Petitioner has accurately described the Court of Appeals decision. However, Appendix A of the Petition as filed by Petitioner is incomplete. Respondents attach the omitted page of the Court of Appeals decision as Respondents' Appendix A. The opinion of the Second Circuit Court of Appeals is also published at 67 F.3d 412 (2nd Cir. 1995).

STATEMENT OF JURISDICTION

Petitioner has accurately stated the basis for jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . .

42 U.S.C. § 3604(a)

The Fair Housing Act (42 U.S.C. § 3601 *et seq.*) makes it unlawful:

> [t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of . . . religion.

42 U.S.C. § 3613(a)(1)(A) and 42 U.S.C. § 3602(j)

Under 42 U.S.C. § 3613(a)(1)(A) the Fair Housing Act confers standing to bring suit on any "aggrieved person."

An "aggrieved person" includes:

any person who –

(1) claims to have been injured by a discriminatory housing practice; or

(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

STATEMENT OF THE CASE

Petitioner's statement of the case omits certain key facts which were central to the determination in Respondents' favor of the Court of Appeals for the Second Circuit.

The individual Respondents are members of Respondent Park Avenue Synagogue, which meets in the home of Respondent Rabbi Yitzchok LeBlanc-Sternberg. His home was originally situated within the corporate limits of the Town of Ramapo, New York. Subsequent to the incorporation of the Petitioner, the home became situated within the limits of the Village of Airmont.

Orthodox Judaism requires "a relatively high number of local houses of worship. Daily prayer is required, and the saying of certain prayers and the reading from the Torah on the Sabbath require the presence of a 'minyan' -- a quorum of ten males over the age of 13. Orthodox Jews are forbidden to use cars or other means of transportation during religious holidays and the weekly Sabbath; thus adherents are required to walk to their houses of worship." *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 417 (2nd Cir. 1995) (Pet., 7a).

Members of a local group, the Airmont Civic Association ("ACA"), were outraged by the Town of Ramapo's use of the Home Professional Office ("HPO") provisions of the Town's zoning code to accommodate the home worship needs of the Orthodox Jewish population in residential areas. A drive was launched by the ACA and its supporters to incorporate their own village, specifically "for control over zoning in connection with the desire to keep Orthodox and Hasidic Jews out of the Airmont community." 67 F.3d 418 (Pet., 9a-10a).

The incorporation of Airmont as a Village was finalized in 1991, and a slate of officers who were ACA members was selected. These officers were opposed to home worship by Orthodox Jews. 67 F.3d 420-421 (Pet., 15a-16a). Five days later, Respondents filed the instant action alleging violation of the Free Exercise of Religion rights of Respondents under the First Amendment, pursuant to 42 U.S.C. § 1983, and alleging violation of 42 U.S.C. § 3601 *et seq.*. Subsequently, Respondent United States filed its action under the Fair Housing Act against Petitioner. Both actions were consolidated for trial.

In 1993 Airmont enacted a zoning code, which was identical to the Ramapo code, except for changes to the HPO section. The Airmont code prohibited "any activities that come into a residential area so as to detract from the residential character of the area," and gave standing to any "aggrieved person" to request that the Board of Zoning Appeals interpret whether any disputed use was in violation of the section. 67 F.3d 420 (Pet., 14a-15a).

At trial, the jury found that Petitioner had violated the rights of these Respondents to the free exercise of their religion, under 42 U.S.C. § 1983, as well as their rights under 42 U.S.C. § 3601 *et seq.* However, in the trial of the Government action the district court found that the Village had taken no injurious action against the Orthodox citizens save only to pass the subject zoning code which the trial court found "arguably could be taken as a signal for a different interpretation" than the accommodating solution arrived at by the Town of Ramapo, but noted that it was equally likely that Airmont would avoid such an interpretation in light of the almost certain litigation that would follow. The trial court, in motions after verdict, struck down the jury's verdict on the motion of Petitioner under Fed. R. Civ. P. 50(b), incorporating its memorandum decision in the Government's case as a basis for its decision against these Respondents. 67 F.3d 423-424, 427-431 (Pet., 32a-41a).

On appeal, the Court of Appeals for the Second Circuit reversed the trial court, noting that the district court's reasoning was, *inter alia*, internally inconsistent. For example, the trial court discussed the foreseeable outcome of the Planning Board, "[v]iewing the evidence in the light most favorable to the Government," not adopting the "Ramapo interpretation of the home professional office exception," 67 F.3d 430 (Pet., 13a-14a). Yet, the court itself neglected to adopt that view "in the light most favorable" to Respondents, as it was required to do in ruling on the Rule 50(b) motion of Petitioner and in assessing the jury verdict that found in Respondents' favor. 67 F.3d 429-31 (Pet., 39a).

Further, the Court of Appeals found ample support for the finding that "the Village conspired to impede the private plaintiffs' exercise of their rights under the First Amendment; that the Village adopted a zoning code that was intended to, and would be interpreted to, curtail home synagogues, thereby deterring Orthodox Jews from purchasing homes in many Airmont neighborhoods." 67 F.3d 429 (Pet., 36a).

The Court of Appeals noted with disfavor the:

> plethora of statements in the record attributed to ACA leaders who became Village officials, expressing anti-Orthodox Jewish sentiments (e.g. by Kendrick, who eventually became mayor, describing Orthodox Jews as "foreigners and interlopers," who were "ignorant and uneducated" and "an insult to" the community); Fletcher, who eventually became a trustee ("the only reason we formed this village is to keep those Jews from Williamsburg out of here."); and Cucolo as a trustee (Village did not "have to pursue an Article 78 [with respect to Rabbi Sternberg's home synagogue], there are other ways we can harass them").

67 F.3d 430 (Pet., 39a). Although no damages were awarded, Respondents and the Government also sought declaratory and injunctive relief, and the Second Circuit remanded the case back to the district court for determination of appropriate relief. 67 F.3d 435 (Appendix A-1).

It is important to note that Petitioner has *not* sought review by this Court of the Second Circuit's reversal of the trial court relating to the sufficiency of the evidence to support the jury's findings that the Petitioner violated the First Amendment and the Fair Housing Act. Thus, this Court is bound by the evidentiary record as construed by the Second Circuit.

Rather, Petitioner seeks review on the question of whether (on the assumption that the zoning code was "facially neutral"), the Court of Appeals for the Second Circuit improperly required Petitioner to affirmatively accommodate the home worship practices of Respondents under the First Amendment and the Fair Housing Act. Secondly, Petitioner urges review on issues of standing and ripeness.We respectfully submit that the decision of the Court of Appeals for the Second Circuit decision was rightly decided and that none of Petitioner's arguments merit review by this Court.

REASONS FOR DENYING THE WRIT

I. THERE IS NO DIVISION IN THE CIRCUITS REGARDING GOVERNMENT ACTION THAT TARGETS RELIGIOUS PRACTICES FOR DISCRIMINATION

Petitioner pronounces a "deep division" among the Circuits regarding the manner of resolving conflicts between local zoning regulations and religious activities restricted or prohibited by those regulations. While it is correct that some of the federal Circuits have adopted differing standards regarding the resolution of those kinds of conflicts, whatever their differences may be, such divisions are beside the point in this case. There is no division, "deep" or otherwise, concerning the invalidity of official government action under the Free Exercise Clause of the First Amendment when that action has, *as its object*, the targeting of religious belief or practice for discriminatory treatment. The cases cited by Petitioner do not indicate otherwise.

In *Lakewood v. City of Lakewood*, 699 F.2d 303 (6th Cir.), *cert. denied* 464 U.S. 815 (1983) the subject zoning code effectively prohibited the construction of new churches in all residential areas, and limited such new construction to ten percent of the area of the city. *Id.*, 699 F.2d 307. However, as the Court emphasized:

> [T]he record does not indicate that the Congregation may not purchase an *existing* church or worship in any building in the remaining ninety percent of the City.

Id. (emphasis added). Thus, the *effect* of the zoning code was *not* to lock-out all religious worship or any particular mode of religious practice. But even more importantly, the Court noted that there was no contention of a discriminatory animus behind the zoning provision:

> Contrary to the Congregation's arguments, this case does not present a situation similar to *Keego Harbor Company v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981). In *Keego Harbor*, a zoning ordinance effectively excluded adult movie theaters from the city by setting severe spacing limitations. This court found the ordinance unconstitutional because the purpose and effect were to eliminate from the city the exercise of a first amendment right.

Id. (emphasis added).

Thus, the law in the Sixth Circuit supports that position that when the purpose and effect of zoning is to limit or exclude activities protected by the First Amendment, the regulation must satisfy strict scrutiny (i.e. *Keego Harbor*), but where the zoning regulation has no such purpose or effect (i.e. where it is truly a "neutral law" of "general applicability," as in *Lakewood*) there is no duty to accommodate Free Exercise activities, particularly where "the activity has no religious or ritualistic significance[1] for the. . ." religious objectors. *Lakewood*, 699 F.2d 306.

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[1] In *Lakewood*, the court could find no Free Exercise significance to the Jehovah's Witnesses having to buy an existing worship structure, as

While Petitioner stresses the language in *Lakewood* that concluded that the effect of the zoning code was simply to make the plaintiff's religious practice "more expensive" (Pet., 7), a circumstance not *per se* violative of Free Exercise, Petitioner ignores the broader context of that rule which finds its source in *Braunfeld v. Brown*, 366 U.S. 599 (1961). As the Court in *Lakewood* points out:

> [T]he incidental economic burden [placed on the plaintiffs in *Braunfeld*] was not unconstitutional because neither the *purpose* nor the *effect* of the law was to impede religious observation or to discriminate among religions.

699 F.2d 306 (emphasis added). In the instant case the Village of Airmont was incorporated for the express purpose of passing zoning restrictions, the *purpose* and *effect* of which was to discriminate against Orthodox Jewish practices. The enormous and impractical cost of building a free-standing synagogue on two acres of land was not an *incidental* financial effect on Respondents because of Airmont's "neutral" and "generally applicable" zoning code; on the contrary, the enormous cost was the very tool used by the Village founders to *intentionally* discourage a disfavored religious group from moving in.

When a municipality purposefully plans to impose financial burdens on a disfavored religious practice as a means of discriminating against it, the Free Exercise Clause protects that religious practice, and will sustain the offending law

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opposed to their desire to construct a new structure in a zoning area on which such construction was now prohibited. In the instant case, however, "[t]he combination of [their religious] requirements makes it important for Orthodox Jews to be able to gather for worship in congregations large enough to ensure the presence of a minyan, and close enough to the congregant's homes to allow them to walk to services." *LeBlanc-Sternberg*, at 67 F.3d 417 (Pet. 7a-8a).

"only in rare cases." *LeBlanc-Sternberg*, 67 F.3d 426, quoting from *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. ___, 113 S.Ct. 2217, 2233 (1992). "[A] law targeting religious beliefs as such is never permissible." *Id.*, 113 S.Ct. at 2227.

The facts in *Lakewood* did not include the intentional targeting of religion, as is the situation in the instant case, and nothing in *Lakewood* is inconsistent with the reasoning of this Court in *Lukumi Babalu* some ten years later.

Similarly, Petitioner's citation to *Grosz v. City of Miami Beach, Fla.*, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984) (Pet., 7), is of no avail in establishing a "division" among the circuits relevant to this case.

Petitioners contention that *Grosz* contains "nearly identical facts" (Pet., 7) is simply incorrect. As was the case in *Lakewood*, the *Grosz* facts did not involve a situation where a municipality intentionally targeted a religious practice for discrimination through its zoning code. Indeed, in *Grosz*, the court stated: "No one contends that zoning laws are based upon disagreement with religious tenets, or are aimed at impeding religion." 721 F.2d 738.

In the instant case, however, the Second Circuit specifically found that Petitioner passed its zoning code as an effort aimed at impeding the religious practices of Orthodox Jews. Further, the *Grosz* case was decided almost a decade before *Lukumi Babalu* and, therefore, any perceived division arising from the *Grosz* decision (or the *Lakewood* decision for that matter) is of dubious value as a basis for this Court to grant certiorari.

While the reasoning in *Grosz* still has influence in the Eleventh Circuit, that Circuit has itself distinguished *Grosz* from the *Lukumi Babalu* paradigm on the basis that the *Lukumi Babalu* case involved "a local law targeting" religious practice for discrimination. *First Assembly of God v. Collier County, Fla.*, 20 F.3d 419, 423 (11th Cir. 1994).

In *First Assembly of God*, the plaintiffs argued that the *Grosz* reasoning was no longer valid law because the *Grosz* reasoning was the basis of the trial court's decision in *Lukumi Babalu*, reasoning which was rejected by this Court. The Eleventh Circuit has concluded that, "[t]he Supreme Court reversed the application of *Grosz*, not the holding of *Grosz* itself or the reasoning behind it." *Id.*, 423 n.4.

Respondents' respectfully submit that, whatever problems there may be with the reasoning used in *Grosz*,[2] that reasoning is simply not applicable to a case of intentional discrimination, as is the case at bar.

Petitioner's reliance on *Islamic Center of Mississippi, Inc. v. City of Starkville, Miss.*, 840 F.2d 293 (5th Cir. 1988) is misplaced, since *Islamic Center* handily distinguishes both *Lakewood* and *Grosz* from the facts in that case.

First, the Court in *Islamic Center* emphasized that in *Lakewood* the evidence showed that the congregation in question could have purchased an existing church within ninety percent of the city's area, or alternatively, could have performed its worship practices in a non-church building within that ninety percent area. *Islamic Center*, 840 F.2d 301. As the court pointed out, "travel to worship," which was a factor for the Islamic students in the *Islamic Center* case, was simply not a factor in *Lakewood. Id.* In the instant case, as in *Islamic Center*, special considerations relating to travel to a worship site are integral to the exercise of faith for the Orthodox Respondents.

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[2] One of the lesser, but more obvious problems in the *Grosz* decision, is its curious reliance on a statement by Supreme Court Justice Vinson in a majority opinion of *American Communications Assn. v. Douds*, 339 U.S. 382, 397 (1950) (cited by the *Grosz* court at 721 F.2d 740.) In fact, Justice Vinson's comments in *Douds* are clearly *obiter dicta*. His comments inferred a basis for the Supreme Court's dismissal, for want of substantiality, of an appeal, in *Corporation of Presiding Bishop, C.J.C.L.D.S.S. v. Porterville*, 338 U.S. 805 (1949), in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance which prevented the building of churches and residential areas.

A further defect is *Grosz*'s reliance on *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), a case where this Court construed the constitutionality of generalized and comprehensive zoning power within the framework of a Due Process analysis. A First Amendment analysis of zoning power, which is required in the instant case, was not adjudicated in *Euclid*.

The Court in *Islamic Center* also easily distinguished the facts in *Grosz*, where the court noted that the plaintiff could have conducted services within four blocks of his home, or had the option of relocating his home to another residential area of the city where home-worship was permitted (an area comprising some fifty percent of the city). 840 F.2d 301.In the instant case, nearly all of Airmont is residential, and all of the residential areas are subject to a zoning code making group worship in a home a non-permitted use unless located in a suitable structure on a two-acre lot. That restriction, coupled with the unique needs of the Orthodox community to be within walking distance of a Sabbath worship site, emphasize the similarity of the instant facts to those in *Islamic Center*, facts which are clearly dissimilar to those in *Lakewood* and *Grosz*.

The court in *Islamic Center* further distinguished the facts in that case from the facts decided in the Eleventh Circuit and Sixth Circuit Cases by pointing out the evidence of a discriminatory motive in the *Islamic Center* record. The court noted that the zoning board had "applied different standards to approving a Muslim mosque than it had adopted for worship facilities of other faiths." *Id.*, 303. Similarly, in the instant case the record shows that the ACA, the prime mover behind Airmont's incorporation and the push for its own zoning code, opposed even a slight variance for an Orthodox Jewish synagogue, yet did not oppose a major variance for a Catholic church structure "because this is the Catholic church that wants it." *LeBlanc-Sternberg*, 67 F.3d 431 (Pet., 41a).

Lastly, even assuming *arguendo* a division in the Eleventh, Sixth, Fifth and Second Circuits, there is another reason why such a division would be ultimately illusory. The decisions in *Lakewood, Grosz* and *Islamic Center* all pre-date this Court's decisions in *Employment Division v. Smith*, 494 U.S. 872 (1990) and *Lukumi Babalu*, as well as Congressional passage of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000 bb (restoring the "compelling interest" and "least restrictive means" tests in light of *Employment Division v. Smith*). How the Eleventh or Sixth Circuits would decide cases whose facts implicate *Smith, Lukumi Babalu*, or RFRA is unknown, and undermines the argument made by Petitioner.

II. THE SECOND CIRCUIT'S OPINION PROPERLY APPLIED *CHURCH OF THE LUKUMI BABALU AYE, INC. V. CITY OF HIALEAH*

Petitioner is incorrect in asserting that in the instant case the Second Circuit opinion "mandates some type of accommodation by the municipality" toward the religious practices of the Respondents. Pet., 9. While we do agree that, if the facts in this case had *not* shown intentional discrimination by the Village of Airmont, that nevertheless the Free Exercise Clause would require some level of accommodation to the religious practices of the Respondents, those were not the facts in this case, and that was not the decision rendered by the Second Circuit. Rather, the Second Circuit decided that the Village of Airmont had intentionally discriminated against the religious practices of the Respondents through its zoning code, in violation of the First Amendment.

Indeed, the Second Circuit specifically declined to decide the "accommodation" issue while noting that "it is unclear to what extent this prohibition [of the Free Exercise Clause] requires states affirmatively to accommodate religious practice" (citing *Lukumi Babalu*). *LeBlanc-Sternberg*, 67 F.3d 426 (Pet., 29a). Petitioner is also incorrect in asserting that the Second Circuit decision in this case "is a total embrace of the four-justice dissenting opinion in *Smith*, as well as the concurring opinion by Justice Souter in *Lukumi Babalu Aye*." Pet., 10.

Whatever reasons may exist for revisiting the rule in *Smith* (*Lukumi Babalu*, 508 U.S. ___, 113 S.Ct. 2217, 2240 (Souter, J., concurring in part, and concurring in the Judgment), 2250 (Blackmun, J., with whom O'Connor, J., joins, concurring in Judgment)), they should not include the mistaken belief that the Second Circuit in the instant case rejected the majority rule in *Smith*. In the instant case, the Second Circuit adopted the *Lukumi Babalu* analytical paradigm because this case, like *Lukumi Babalu*, involved intentional targeting of a religious practice by a local municipality. *Lukumi Babalu* did not overturn *Smith*.[3]

To a great degree, Petitioner's error lies in the insistence that "neutrality" and "general applicability," as those terms arise under *Smith*, and as further construed in *Lukumi Babalu*, are limited only to laws that are "*facially* neutral." Thus, because Petitioner denominates its zoning ordinance as "*facially* neutral" (Pet., 4) (emphasis added), Petitioner mistakenly assumes that the neutrality analysis ends there.

In fact, *Lukumi Babalu* specifically rejected the contention that this Court's "inquiry [with respect to neutrality under the Free Exercise Clause] must end with the text of the laws at issue," adding that:

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[3] Admittedly, in *Lukumi Babalu*, Justice Souter, concurring in the Judgement, had "doubts about whether the *Smith* rule merits adherence," (113 S.Ct. at 2240) and Justice Blackmun and Justice O'Connor, while concurring in the Judgement, expressed their position that they "continue to believe that *Smith* was wrongly decided because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an anti-discrimination principal," (113 S.Ct. at 2250) (citations omitted).

> Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination.

113 S.Ct. at 2227. Rather, the ultimate test is whether "the object of the ordinances" is the "suppression . . . of the central element of [Respondents'] worship service." *Id.*

Finally, Justice Souter's concurrence in *Lukumi Babalu* conceded that:

> The proposition for which the *Smith* rule stands, then, is that formal neutrality, along with general applicability, are sufficient conditions for constitutionality under the Free Exercise Clause. That proposition *is not at issue in this case*, however, for Hialeah's animal-sacrifice ordinances are not neutral under any definition, any more than they are generally applicable.

113 S.Ct. at 2242 (emphasis added).

If Hialeah's animal sacrifice laws were not neutral under "any definition," then likewise, the zoning ordinances of the Village of Airmont in this case are not "neutral" or "generally applicable" under any definition. Thus, revisiting the use of those terms in the *Smith* case is not compelled by the Second Circuit's opinion in this case.

III. THIS ACTION DOES NOT VIOLATE RULES REGARDING STANDING OR RIPENESS

Petitioner contends that this Court should review Respondents' lack of standing to have brought this case in the first instance, arguing that Respondents did not suffer any injury and failed to identify any future harm that possessed "imminence or immediacy," Pet., 10-11.

At a minimum, the Constitution requires plaintiffs to show they have suffered "some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College v. Americans United for the*

Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). The injury must be traceable to the challenged action and be "likely to be redressed by a favorable decision." *Id.*; *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). The injury must result from an invasion of a legally protected interest which is (1) concrete or particularized and (2) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Within the foregoing analysis of standing, Petitioner argues that because Respondents did not suffer any past "actual" injury (as Respondents had already obtained permission from the Town of Ramapo to conduct their home worship services, prior to the Airmont incorporation), the only remaining issue was whether or not Respondents showed a sufficient "imminent" threatened injury that was not conjectural or hypothetical.

The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Indirect damage to the use of one's land, which is the subject of governmental action, is sufficient to confer standing. *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973).

Airmont's incorporation, and the changes to the HPO provisions of its zoning codes, clearly presented the Respondents with a situation where Rabbi Sternberg's home was a non-conforming use for purposes of home synagogue worship. Pet., 14 n.2. This, coupled with the reality that the Village of Airmont (not the Town of Ramapo) would be the government entity enforcing and policing the Respondents' use of the Sternberg home for worship purposes, show a likelihood of imminent harm to the Respondents imposed by Airmont's incorporation and the passage of its zoning law.

Respondents have contended that the legal paradigm for the First Amendment issues in this case lies within the parameters of the decision in *Lukumi Babalu, supra*. It is important to note that the plaintiff church in that case filed an action under 42 U.S.C. § 1983, "[f]ollowing enactment of [the] ordinances. . . ," with no hint that the City of Hialeah had sought to specifically enforce its ordinances against the plaintiff church. *Id.*, 113 S.Ct. at 2224.

In the instant case, the Second Circuit determined that ". . .there was ample support for the jury's implicit finding that Airmont's zoning code would be interpreted to restrict the use of home synagogues, that the motivation behind the enactment was discriminatory against Orthodox and Hasidic Jews, and that Airmont pursued this goal jointly with A.C.A." 67 F.3d 431 (Pet., 41a). As the Second Circuit pointed out, "the victim of a conspiracy to violate First Amendment freedoms has standing to bring suit before the conspiracy has resulted in economic or tangible injury." 67 F.3d 426 (Pet., 30a), citing *Virginia v. American Booksellers Assoc., Inc.*, 484 U.S. 383, 393 (1988) (facial First Amendment challenge to a state law limiting the display of sexually explicit material, which was brought prior to the law's enforcement, was determined not to be premature).

Because Petitioner in the instant case does not challenge the Second Circuit's evaluation of the sufficiency of the evidence to support the jury verdict, we would submit that the Second Circuit's conclusions as to the probable harm that would be caused to Respondents by Petitioner's zoning code must be upheld. That being the case, Respondents have more than adequately demonstrated a concrete and imminent injury to their First Amendment rights sufficient to satisfy the requirements of standing under Article III of the U.S. Constitution.

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) does not compel a different conclusion. In *Lujan*, wildlife and environmental organizations filed suit challenging an agency rule limiting a section of the Endangered Species Act of 1973 geographically to the borders of the United States and the high seas, but excluding coverage to any actions having a wildlife impact in foreign nations. This Court found a lack of standing because, *inter alia*, standing is difficult, if not impossible to show where third parties, rather than the complaining environmental and wildlife organizations themselves, were the object of the governmental decision which was being objected to.

The organizations had filed affidavits claiming that some of their members intended to revisit sites that would be affected by the agency decision at some indefinite, future time. This Court rightly determined that a vague intent to take some action that might expose the complaining party to offending government action at some indefinite, future time, does not constitute an "imminent" injury for standing purposes.

By contrast, in the instant case, the palpable and concrete injury that is imminent as to Respondents lies in the announced intention of Petitioner to prohibit home synagogue worship through its strict zoning code and its strict zoning interpretation. The imminence of the injury lies not in the vague intentions of the complaining parties (as was the case in *Lujan*), but entirely within the declared intentions of Petitioner to discriminate against the religious practices of Respondents.

Petitioner also cites a lack of ripeness as a basis for this Court to grant certiorari. However, Petitioner's citation to *U.S. v. Village of Palatine, Ill.*, 37 F.3d 1230 (7th Cir. 1994) must lead us to the conclusion that they are "hoist on their own petard." Indeed, Petitioner's own argument cites the following determinative reasoning of the Seventh Circuit:

> [I]f the Plaintiff's claim were of discriminatory intent, rather than failure to make a reasonable accommodation, this claim *might well be* presently ripe even though Oxford House-Mallard has not sought a special use approval.

Pet., 19-20 n.4; 37 F.3d 1233 n.3."

Thus, where it has been established that a zoning ordinance will likely be applied in a discriminatory manner, it is unnecessary that the municipality so apply it before the ordinance may properly be challenged." (*LeBlanc-Sternberg*, 67 F.3d 425 (Pet., 26a), citing *Parkview Heights Corp. v. City of Blackjack*, 467 F.2d 1208, 1214-16 (8th Cir. 1972).)

The doctrine of ripeness is a prudential doctrine of this Court, taking into consideration the fitness of the issues for judicial decision-making, and the hardship to the complaining party of withholding judicial consideration. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). Where, as here, there is powerful and established evidence of Petitioner's plan and governmental action to discriminate against Respondents' Free Exercise rights, and where Petitioner has passed a zoning ordinance to implement that discriminatory intent, it would be both imprudent and futile to require Respondents to wait until Petitioner actually brings enforcement proceedings against their home synagogue activity as a precondition to filing suit.

The threat and the injury to Respondents has been proven to a probability (and not a mere possibility), and that, coupled with the proven discriminatory intent of Petitioner should resolve any standing or ripeness concerns. *Village of Arlington Heights v. Metropolitan Housing Development Co.*, 429 US. 252 (1977). (Minority plaintiff had standing to challenge exclusionary zoning scheme, where plaintiff would "probably" have moved into the housing project if it were built.)

Respondents respectfully submit that this Court need not, and should not, venture into uncharted and unnecessary construction of the Fair Housing Act's definition of an "aggrieved" person, merely because it may provide guidance to future litigants (See Pet., 11).

Ironically, if this Court were to accept the invitation of Petitioner to launch into such unnecessary construction of a Congressional enactment, that act of judicial review would, itself, be inconsistent with the very purposes behind the standing requirements of Article III and the ripeness doctrine, both of which serve to limit adjudication to actual, and not abstract, legal controversies.

CONCLUSION

Respondents respectfully submit that Petitioner has not only failed to identify any important question of federal law for this Court to review or any "deep division" among the Circuits, but has also failed to demonstrate any reason why the decision of the Second Circuit Court of Appeals regarding the discriminatory nature of Petitioner's conduct should not be upheld. We request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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March 27, 1996

On Remand, the district court should, applying Fair Housing Act principles, fashion appropriate equitable remedies.

CONCLUSION

We have considered all of the parties' arguments in support of their respective positions on these appeals and, except to the extent indicated above, have found them to be without merit. For the reasons stated above, we conclude that the district court erred in granting the Village of Airmont judgment as a matter of law dismissing the private plaintiffs' FHA and civil rights claims; that the jury's verdict with respect to these claims was dispositive with regard to the issue of the Village's liability in the government's suit under the FHA; and that the private plaintiffs and the government were entitled to relief.

We reverse so much of judgment entered in the private plaintiff's action, appealed in Nos. 94-7103 and -6125, as dismissed the private plaintiffs' claims against the Village; we affirm so much of that judgment as dismissed the private plaintiffs' claims against the individual defendants; and we dismiss the cross-appeal as moot. The private plaintiffs' action is remanded for the entry of judgment awarding those plaintiffs nominal damages and such injunctive and other relief as may be appropriate.

Supreme Court, U.S.
FILED
MAY 24 1996

(4)

No. 95-1381

In the Supreme Court of the United States

OCTOBER TERM, 1995

VILLAGE OF AIRMONT, NEW YORK, ET AL., PETITIONERS

v.

RABBI YITZCHOK LEBLANC-STERNBERG, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the evidence justified a jury verdict finding that petitioners had violated the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, in that they intentionally discriminated against respondents and other Orthodox and Hasidic Jews by enacting a zoning ordinance for the purpose of excluding places of worship necessary to the practice of their religion.

2. Whether the court of appeals correctly held that respondents' claims warranted injunctive relief.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a)[1] is reported at 67 F.3d 412. The opinions of the district court (Supp. Pet. App. 51a-56a, 57a-89a) are reported at 846 F. Supp. 294 and 839 F. Supp. 1054, respectively.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1995. A petition for rehearing was denied on November 28, 1995. Pet. App. 50a. The petition for a writ of certiorari was filed on February 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The appendix to the petition does not include the last page of the court of appeals' opinion. It is attached as an appendix to the LeBlanc-Sternberg Brief in Opposition.

STATEMENT

1. This litigation arose out of the incorporation of the Village of Airmont, New York, in 1991. Prior to incorporation, the Airmont community was an unincorporated area of the Town of Ramapo, New York. During the 1980s, the number of Orthodox Jews (including Hasidic Jews, a subgroup of Orthodox Jewry) residing in Ramapo increased dramatically. Pet. App. 7a. In most residential areas, however, Ramapo's zoning code would not allow a place of worship to be located on a lot of less than two acres, and "[c]onstruction of a synagogue on such a lot would cost as much as $750,000, an expenditure that would require the support of approximately 150 families, far beyond the number of Orthodox Jewish families living near each other in Airmont." *Id.* at 8a. Unlike adherents of other religious faiths, Orthodox Jews cannot travel substantial distances to a place of worship for services or prayer because the tenets of their religion do not permit them to use mechanical means of transportation on the Sabbath or on certain religious holidays. *Id.* at 7a. Strict observance by Orthodox Jews also requires daily worship, and certain prayers may be said only if a "minyan," a group of ten males at or above the age of thirteen, is present. *Ibid.* As a consequence, Orthodox Jews must live within walking distance of a place where they can congregate for worship. *Id.* at 7a-8a.

In the mid-1980s, Ramapo accommodated the needs of Orthodox Jews for a place of worship near their homes by relying on a provision of its zoning code regarding "home professional office[s]," which permits members of certain "learned professions," including clergy, to operate offices within their homes, subject to certain restrictions. Pet. App. 8a. Ramapo interpreted the zoning code provision to permit rabbis to conduct worship services in their homes, subject to limitations on the number of persons who could gather at any given time. *Id.* at 8a-9a. Ramapo also enacted a change in its zoning code to permit multifamily dwellings in a small section of town where a group of Hasidic Jews resided. *Id.* at 9a.

When a group of Hasidic Jews purchased another parcel of land in the Airmont area, a group of Ramapo residents from that area, who were members of the Airmont Civic Association (ACA), began efforts to incorporate Airmont as a village. As an incorporated village, separate from Ramapo, Airmont would be able to have its own zoning code. Pet. App. 9a.

The ACA sought incorporation as a village with the expressed intent of keeping Orthodox and Hasidic Jews out of the Airmont community. Pet. App. 9a-10a. For example, at an ACA meeting in August, 1986, ACA leaders read aloud a response to a poll conducted by the ACA of Airmont residents that stated:

> [W]hat would be better, for us to loose [*sic*] our homes for a religious sect or for us to live as we have lived for the past 25 years * * *.
>
> * * * * *
>
> * * * [L]et the people in the unincorporated Area of Ramapo, go ahead and fight for what they believe in. Instead of giving up for what we've worked very hard for, to a bunch of people who insist on living in the past. I am not prejudice [*sic*]

> in any way, shape or form but i [*sic*] *will not* have a hasidic community in my backyard.

Id. at 10a. (emphasis in original). The minutes of the same meeting reported predictions of "a grim picture of a Hasidic belt from Rockland through Orange & Sullivan counties." *Ibid.* At an ACA meeting shortly after the land purchase, an attendee stated that "everybody knows * * * why the Airmont Civic Association was formed. What does the Airmont Civic Association and the proposed village plan to do to keep these Hasidum [*sic*] out?" *Ibid.* The ACA's original president, James Filenbaum, told the developer of the Hasidic Jews' land parcel that "the reason of forming this village is to keep people like you out of this neighborhood." *Ibid.* At another ACA meeting, an attendee stated that "the only reason we formed this village is to keep those Jews from Williamsburg [a Hasidic community in Brooklyn, New York] out of here." *Id.* at 11a.

A referendum on incorporation of Airmont was held on January 30, 1989, and the vote was in favor of incorporation by a margin of 3 to 1. Pet. App. 11a. Formal incorporation was delayed, however, by litigation in state court challenging the manner in which the referendum was conducted. Meanwhile, the ACA continued to oppose actions by the Town of Ramapo to approve zoning variances that would allow Orthodox Jewish houses of worship. For example, ACA opposition, including litigation in state court, delayed the Town's approval of an application by a rabbi to construct a free-standing synagogue on a lot that was 1.926 acres, slightly under the two-acre minimum required by the zoning code. *Id.* at 13a.

In addition, ACA members went before the Ramapo Planning Board to oppose respondent Rabbi LeBlanc-Sternberg's application to conduct worship services in his home. In the course of doing so, they expressed anti-Orthodox sentiments and stated that Orthodox Jews should not have moved into the area, since they knew when they did so that there were no houses of worship. Pet. App. 13a-14a. Ramapo initially denied the application, then twice approved it, but the ACA financed two successful state court challenges to the approvals. *Id.* at 14a. Ramapo approved the application for a third time, including certain restrictions on the number of congregants and restricting home worship to Jewish holidays and the Sabbath. *Ibid.* By then, the Village of Airmont was incorporated and it decided not to pursue a third state court challenge. A village trustee and former ACA board member stated that the Village did not need to pursue another state court challenge since "there are other ways we can harass them." *Ibid.* An ACA member, who was later appointed to the Airmont Planning Board, and others stationed themselves outside Rabbi LeBlanc-Sternberg's house to count the number of congregants (*ibid.*), and "conducted surveillances of Orthodox Jewish homes at prayer times" (*id.* at 16a).

2. a. The Village of Airmont was formally incorporated on April 10, 1991. Pet. App. 11a. On April 12, 1991, the private respondents, a group of Orthodox Jewish residents of the Village of Airmont, including Rabbi LeBlanc-Sternberg, filed a complaint in the United States District Court for the Southern District of New York, against the Village, the ACA, Ramapo and several leaders of the incorporation movement, claiming that the incorporation of the Village had been undertaken for the purpose of

excluding Orthodox Jews, in violation of various federal laws, including the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, and the First Amendment. They sought damages and injunctive relief, and moved preliminarily to enjoin the election of the Village mayor and board of trustees that was scheduled for May 16, 1991. Pet. App. 12a. The district court denied an injunction on the grounds that respondents had failed to establish irreparable harm. *LeBlanc-Sternberg* v. *Fletcher*, 763 F. Supp. 1246, 1250-1252 (S.D.N.Y. 1991). Shortly thereafter, the ACA's slate of candidates was elected and took office as the Village Mayor and the members of its Board of Trustees. Pet. App. 12a.

On December 17, 1991, the United States filed suit against the ACA, the Village, and the Village trustees in their official capacities, alleging that the incorporation of Airmont had been accomplished "for the purpose of excluding Orthodox Jews" from the Village by, *inter alia*, imposing burdensome zoning and other restrictions upon Orthodox Jewish places of worship in the Village, in violation of the FHA. The United States sought declaratory and injunctive relief. Pet. App. 12a.

In January, 1993, the Village of Airmont adopted a zoning code. Pet. App. 14a. The code contained several modifications of the "home professional office" provision of the Ramapo zoning code and stated the Village's intention that that provision "not generate activities that come into a residential area so as to detract from the residential character of the area." *Id.* at 15a. The Village appointed a board of appeals and a planning board to interpret and apply the code. One of the appointed board members was an ACA member who had stated that most persons were opposed to home houses of worship; he also had participated in the surveillance of Orthodox Jewish homes at prayer time. *Id.* at 15a-16a. The mayor and three of the four trustees who adopted the zoning code all "testified at trial that they were opposed to the Ramapo-type interpretation of the [home professional office] provision to allow worship services in the homes of clergy." *Id.* at 16a. Respondents contended that, in light of the circumstances surrounding the adoption of the zoning provision, the interpretation it would be given was a foregone conclusion. See *ibid.*

b. The two cases were consolidated and proceeded to trial.[2] The damages claims by the private respondents were tried to a jury at the request of petitioners; the government's suit was tried to the court. Pet. App. 12a-13a.[3] On December 13, 1993, after eight weeks of trial and a week of deliberations, the jury returned a verdict against the Village, finding that it had violated private respondents' rights under the FHA and had conspired to violate their rights under the First Amendment. *Id.* at 18a-19a. The jury awarded no damages. *Id.* at 19a. The jury returned a verdict in favor of the individual defendants. *Id.* at 18a.

Two days after the jury verdict, the district court dismissed the government's suit. Pet. App. 19a; Supp.

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[2] On December 24, 1991, the district court had denied petitioners' motion to dismiss the private suit, rejecting, *inter alia*, petitioners' challenge to the private respondents' standing, to the justiciability of their claims, and to their statement of a cause of action. *LeBlanc-Sternberg* v. *Fletcher*, 781 F. Supp. 261 (S.D.N.Y. 1991).

[3] Claims against some original defendants were settled or dismissed prior to trial and a default judgment had been entered against the ACA. Pet. App. 17a.

Pet. App. 57a-89a. The court found that there was no basis for injunctive relief because the Village of Airmont had not taken any actions that violated the rights of Orthodox Jews in that, since incorporation, it had enacted, but not interpreted, the zoning code. The court stated that, although the differences between the Airmont code and the Ramapo code "arguably could be taken as a signal for a different interpretation," the Village "might not" interpret its code to prevent the use of home houses of worship by Orthodox and Hasidic rabbis for worship services. Pet. App. 19a; Supp. Pet. App. 77a-79a. The court dismissed the case, notwithstanding its acknowledgment that, "[v]iewing the evidence in the light most favorable to the Government, we can foresee that the [Airmont] Planning Board and the Zoning Board of Appeals (to the extent the matter might be submitted to it) will not adopt the Ramapo interpretation of the home professional office exception." Pet. App. 20a. The court also recognized that the absence of actions against the Orthodox and Hasidic Jews in Airmont by the Village or the trustees since the incorporation of the Village could have been caused by the pendency of the instant litigation. *Ibid.* The court concluded that, "if there is any action taken in the future which violates their rights, the United States Government and other plaintiffs will not be timorous about suing. Consequently, we see no basis or need for injunctive relief." *Id.* at 20a-21a. The court believed that injunctive relief, as requested by the United States, to prohibit petitioners from denying persons their constitutional rights "was unnecessary because it would merely enjoin acts that are already illegal." *Id.* at 21a; Supp. Pet. App. 79a.

The district court also denied private respondents any injunctive relief. Pet. App. 21a. Three months after trial, on March 16, 1994, the district court also granted petitioners' motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). Pet. App. 22a; Supp. Pet. App. 51a-56a. The court viewed the jury verdict against the Village as internally inconsistent because the jury had found that the Village had violated the private respondents' FHA rights and conspired to violate their constitutional rights to the free exercise of religion and free speech, but "did not award any damages[,] not even the $1 nominal damages it could have awarded on the civil rights claim." Supp. Pet. App. 52a. The court incorporated in its findings the facts it had found and the reasoning set forth in its decision dismissing the government's suit. *Id.* at 53a. The court also rejected the argument that petitioners' actions had a chilling effect on the respondents' First Amendment rights and concluded that, because the private respondents already had their zoning permits, the worst situation they would face, if the Airmont code were to be interpreted differently from the Ramapo code, would be as a non-conforming use. Pet. App. 23a; Supp. Pet. App. 54a.

3. The court of appeals reversed the judgments dismissing the private respondents' and the United States' claims against the Village.[4] Pet. App. 1a-49a; LeBlanc-Sternberg Br. in Opp. App. A1. The court

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[4] The court affirmed the judgment dismissing the private respondents' suit against the individual defendants and dismissed the cross-appeal of two of the individual defendants as moot. Pet. App. 6a, 44a-46a; LeBlanc-Sternberg Br. in Opp. App. A1.

remanded for an award of nominal damages and injunctive relief in the private suit and for declaratory and injunctive relief in the United States' action. LeBlanc-Sternberg Br. in Opp. App. A-1.

The court held that "the evidence was sufficient to establish that Airmont violated the private [respondents'] rights under the Fair Housing Act and the First Amendment; that the district court was not entitled to set aside the jury's verdict against the Village on those claims on the basis of the court's own findings in the government's action; that in light of the established violation of their rights, the private [respondents] were entitled to an award of nominal damages; that the jury's verdict against the Village constituted collateral estoppel that required the court to find that the government had established a violation by the Village; and that in ruling that injunctive relief was not appropriate, the court failed to apply pertinent [Fair Housing Act] principles." Pet. App. 24a-25a. The court found that, when viewed in the light most favorable to the private respondents, "there was ample support for the jury's implicit finding that Airmont's zoning code would be interpreted to restrict the use of home synagogues, that the motivation behind the enactment was discriminatory animus toward Orthodox and Hasidic Jews, and that Airmont pursued this goal jointly with ACA." *Id.* at 41a. Accordingly, private respondents established the Village of Airmont's liability on their claims under the FHA, the First Amendment, and 42 U.S.C. 1983 and 1985(3), entitling them to nominal damages. Pet. App. 36a-42a. The court ordered the district court to consider whether injunctive relief in favor of private respondents was appropriate in light of the jury's verdict. *Id.* at 44a.

The court of appeals held that the United States was entitled to a declaratory judgment under its FHA claim. Pet. App. 47a-48a. In addition, the court held that the United States was entitled to an injunction "prohibiting the application of the Airmont zoning code in the discriminatory manner found to be predictable from the evidence in this record." *Id.* at 49a.

The court of appeals denied a petition for rehearing on November 11, 1995. Pet. App. 50a.[5]

ARGUMENT

The United States brought suit under the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, in order to prevent the Village of Airmont and its officials from fulfilling their expressed intent to keep Orthodox and Hasidic Jews from living and practicing their religion within the Village. Petitioners do not challenge the merits of the court of appeals' decision under the FHA. There is, indeed, no basis for doing so in light of well-established principles that forbid a government from taking action with the purpose of excluding a class of persons protected by the FHA from residing within its jurisdiction. See, *e.g.*, *United States* v. *City of Parma*, 661 F.2d 562 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982); *United States* v. *City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975). Petitioners, instead, assert that there is a conflict among the circuits concerning the proper standard under the First Amendment for reviewing local zoning actions that involve religious discrimination, and they urge reversal of the court of appeals' ruling on ripeness grounds. Neither of those contentions has merit.

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[5] On remand, the district court entered injunctive relief against the Village in both cases, awarded the private respondents nominal damages and entered declaratory relief in the government's case. *United States* v. *Village of Airmont*, No. 91 Civ. 8453 (GLG), 1996 WL 208307, 208244 (S.D.N.Y. Apr. 25, 1996); *LeBlanc-Sternberg* v. *Fletcher*, No. 91 Civ. 2550 (GLG), 1996 WL 208307, 208302 (S.D.N.Y. Apr. 25, 1996).

1. Petitioners seek review of the court of appeals' judgment remanding the cases for further proceedings. Pet. App. 6a. This Court ordinarily does not review interlocutory decisions of this type on certiorari. See *Virginia Military Institute* v. *United States*, 113 S. Ct. 2431, 2432 (1993) (opinion of Scalia, J., respecting denial of certiorari), citing *American Construction Co.* v. *Jacksonville, T. & K.W.R.R.*, 148 U.S. 372, 384 (1893); and *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (per curiam). The lack of finality of the judgment below is thus "of itself alone" a "sufficient ground for the denial of the [writ]." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).[6]

2. Petitioners contend (Pet. 6-10) that the courts of appeals are divided regarding whether the First Amendment requires any accommodation for religious worship that is burdened by local zoning decisions.

Neither of the cases cited by petitioners (Pet. 6-9) as purportedly in conflict with the decision below, *i.e.*, *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc.* v. *City of Lakewood*, 699 F.2d 303 (6th Cir.), cert. denied, 464 U.S. 815 (1983), and *Grosz* v. *City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984), involved allegations of intentional discrimination. Both involved application of neutral laws of general applicability which, under *Employment Div., Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990), "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993).[7]

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[6] As noted above, see note 5, *supra*, the district court has entered its judgments on remand and petitioners may seek further review of those final orders.

Lakewood involved a zoning ordinance that prohibited the building of a church in a residential neighborhood. The ordinance prevented the Congregation of Jehovah's Witnesses from being able to build a new church on a lot that it owned. The court emphasized that the ordinance did not have the purpose or effect of prohibiting the Jehovah's Witnesses or any other faith from practicing its religion. 699 F.2d at 307. The ordinance "simply regulate[d] a secular activity and, as applied to the [Congregation], operate[d] so as to make the practice of their religious beliefs more expensive." *Ibid.*, quoting *Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961) (opinion of Warren, C.J.). The court in *Lakewood* contrasted the situation there with that in *Keego Harbor Co.* v. *City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981), in which a zoning ordinance had been declared unconstitutional because "its purpose and effect were to eliminate from the city the exercise of a first amendment right." *Lakewood*, 699 F.2d at 307.

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[7] This case does not involve a claim under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, which was enacted in response to this Court's decision in *Smith*. RFRA restores the compelling interest test, as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), for claims involving governmental action that substantially burdens the exercise of religion, even if the burden results from a rule of general applicability.

Similarly, in *Grosz*, there was no contention that the zoning laws at issue were "aimed at impeding religion." 721 F.2d at 733. It was instead uncontroverted that "the law has both secular purpose and effect." *Id.* at 738. The Eleventh Circuit found that the home of the rabbi in which the religious services were sought to be conducted was within four blocks of a district in which publicly attended religious services were permitted, and that services were permitted in one-half of the City's territory. *Id.* at 731, 739.

The Eleventh Circuit in *First Assembly of God of Naples, Florida, Inc.* v. *Collier County*, 20 F.3d 419, modified on other grounds on denial of rehearing, 27 F.3d 526 (1994), cert. denied, 115 S. Ct. 730 (1995), noted the special analysis that is required when a zoning ordinance singles out a particular religious practice for unfavorable treatment. The court contrasted the situation in *Grosz* from that in *Lukumi Babalu Aye*, where the local law was held to violate the Free Exercise Clause because it "target[ed] the use of animal sacrifice for religious purposes." *First Assembly of God*, 20 F.3d at 423. Both *Grosz* and *First Assembly of God* involved enactments of general applicability not motivated by hostility toward religion. The compelling interest analysis applied in *Lukumi* was therefore not applicable. *Id.* at 424.[8]

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[8] In an amendment to its decision, added in the course of denying a petition for rehearing and suggestion of rehearing en banc, the *First Assembly* court noted that RFRA, which was enacted on November 16, 1993, might be applicable to the claims in that case. It declined to address that issue, because it had not been raised by either party. *First Assembly of God of*

Unlike *Lakewood* and *Grosz*, the instant case involves purposeful discrimination based upon religion. The Village of Airmont was incorporated for the purpose of deterring Orthodox Jews from residing in Airmont and the Village conspired to impede the private plaintiffs' exercise of their First Amendment free exercise rights. Pet. App. 36a, 41a. The court of appeals' decision in this case is also consistent with the only decision cited by petitioners (Pet. 8-9) that involved purposeful discrimination against a particular religious group. *Islamic Center of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293 (5th Cir. 1988). In that case, the court concluded that the city "favored Christian churches over Muslim mosques" by granting exemptions from its zoning ordinance for every Christian denomination that had applied; the city denied an exemption only to the Islamic group. *Id.* at 294, 297, 302-303.

3. The court of appeals correctly applied settled principles of law in concluding that respondents had standing to bring this action and that injury to respondents was sufficiently impending to warrant injunctive relief. Petitioners' disagreement with the court of appeals' decision focuses on the requirement that the injury complained of by respondents be "actual or imminent." Pet. 12-13, citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990). The decision below, however, was premised on the well-established principle that a plaintiff need not "await the consummation of threatened injury to obtain preventive relief." *Pennsylvania* v. *West Virginia*,

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Naples, Florida, Inc. v. *Collier County*, 27 F.3d 526 (11th Cir. 1994), cert. denied, 115 S. Ct. 730 (1995). See note 7, *supra*.

262 U.S. 553, 593 (1923). The court of appeals also emphasized that "the victim of a conspiracy to violate First Amendment freedoms has standing to bring suit before the conspiracy has resulted in economic or tangible injury." Pet. App. 30a, citing *Virginia* v. *American Booksellers Association, Inc.*, 484 U.S. 383, 393 (1988) (facial First Amendment challenge to law limiting display of sexually explicit material, prior to law's enforcement, was not premature).

As the court of appeals recognized (Pet. App. 26a), the FHA provides standing to a person who believes he "will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. 3602(i)(2). This provision is based on the well-established principle that "a suit for an injunction deals primarily, not with past violations, but with threatened future ones; * * * an injunction may issue to prevent future wrong, although no right has yet been violated." *Swift & Co.* v. *United States*, 276 U.S. 311, 326 (1928); accord *Farmer* v. *Brennan*, 114 S. Ct. 1970, 1983 (1994) (prisoner facing substantial risk of serious injury is not required to wait for "tragic event" such as actual assault before bringing suit to obtain injunctive relief).

The trial evidence demonstrated the need for judicial intervention in this case. The incorporation of the Village of Airmont, for the expressed purpose of enacting a stricter zoning code than Ramapo's code, in order to exclude Orthodox Jews' home houses of worship (as well as the enactment of the Airmont zoning ordinance itself) were designed to chill the exercise of both First Amendment and FHA rights. See Pet. App. 26a-27a, quoting *Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208, 1216 (8th Cir. 1972) (under circumstances similar to those in this case, court found "[i]t would be futile to require the plaintiffs to proceed any further at the local level").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1996

95-1381 (5)

No. ______________

Supreme Court, U.S.
FILED
JUN 21 1996
CLERK

IN THE

Supreme Court of the United States

October Term, 1995

◆

THE VILLAGE OF AIRMONT, and its Municipal Officers,
Petitioners,

-against-

RABBI YITZCHOK LEBLANC-STERNBERG, CHANIE LEBLANC-STERNBERG, FRED WALFISH, LEWIS KAMMAN, PARK AVENUE SYNAGOGUE, INC., UNITED STATES OF AMERICA,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

VILLAGE OF AIRMONT, and
its municipal officers,

Petitioners,

-against-

RABBI YITZCHOK LEBLANC-STERNBERG,
et. al.,

Respondents.

REPLY STATEMENT

In Respondents' Brief (like the Second Circuit) a tortuous process is undertaken with selective references to the Record. In fact, this process becomes such a labyrinth that Respondents ultimately claimed the Village of Airmont

("Village") "intentionally" discriminated based upon religion. (Respondents Brief, p. 8). This bald and bold assertion by Respondents is completely unsupported by the Record as was the Second Circuit holding in that regard.

By means of example, Respondents initial witness testified Respondents were "not" claiming the Village violated a right to worship. (Tr. 494). And, other Respondents agreed the Village did not interfere with their religious worship. (Tr. 488 and 825). Even Respondents Rabbi conceded in the Record prayer could take place anytime in Airmont. (Tr. 2198). Therefore, claims of intentional discrimination by Airmont are disingenous.

Although the Trial Court and jury found the Village was not formed for discriminatory purposes, Respondents substituted the Airmont Civic Association ("ACA") that no longer existed when the Village was formed for the Village Government in their flawed analysis. As undisputed evidence in the Record indicates, the ACA was a completely separate entity from the Village Government. And, as a witness called to testify by Respondents confirmed, the ACA objected to certain zoning matters that even Orthodox Jewish residents found objectionable. (Tr. 2118).

In another example, it was a zoning practice by another municipality (misinterpreting a zoning provision for home professional office) that was used in a misguided effort to accommodate Orthodox Jewish residents. Such effort - even Respondents' own witness at trial testified - was "an interpretation of the existing code without any parameters." (Tr. 3373). Accordingly, far from the Village engaging in intentional discrimination, the Village did nothing to injury Respondents except establish parameters for zoning uses.

Moreover, the Second Circuit in a tortured reading of this Record to reach its conclusion disturbed findings of credibility by the jury on critical issues. In the Record an individual, John Layne, testified at trial that religion did not matter when considering a zoning application. That individual (who later became a Village Trustee) testified it was the zoning application (not the applicant) that was to be controlling on zoning review. (Tr. 4293). Yet, the Second Circuit credited testimony by a Respondent to the contrary about what Petitioner Layne testified. Thus, the jury found this individual Petitioner to be credible, but the Second Circuit ignored the Record and jury determination in that important matter. (A. 16).

Most disturbingly, the Second Circuit Decision permitted the Fair Housing Act to be utilized to promote racial and religious segregation since *all* houses in Respondents' neighborhood were occupied exclusively by Orthodox Jewish residents. (Tr. 416). Strangely, no where in Respondents papers is there any denial that the Second Circuit decision permitted creation of a racially and religiously segregated neighborhood.

Finally, the Second Circuit decision permitted unregulated public assembly for worship. Under the Second Circuit holding, zoning limitations as to time and place restrictions for public assembly to worship are now improper. On any lot, with any lot size, in every zoning district, places of worship are now allowed. The results is a crazy quilt of unregulated public assembly since in the words of the Respondents own attorney who had a place of worship on his street, "I don't care about the other Jews. I got a place to pray. Let them solve their problem." (Tr. 4183). Each religious group will now solve their "problem" of where to pray without any Village rules or regulations according to the Second Circuit.

From this Second Circuit Decision, the Trial Court Judge on remand imposed a draconian revision to the Village zoning code that completely overrides local zoning power. What results is a hodge podge of constitutional restrictions dependent on what Circuit one worships at the time. Solving the "problem" of religious worship is now made much more difficult by the Second Circuit decision.

POINT I. A DEEP DIVISION REMAINS IN THE CIRCUIT ON THE ISSUE PRESENTED IN THIS PETITION

Notwithstanding precedent prestidigitation by Respondents in their Briefs, the Second Circuit decision deeply differs from determinations in other Circuits on zoning and religious worship. Otherwise stated, what the Village of Airmont in zoning is prohibited from doing by the Second Circuit is what the City of Miami is permitted to do by the Eleventh Circuit. (*Lakewood v. City of Lakewood*, 699 F.2d 303 (6th Cir.) (cert. denied. 464 U.S. 815 (1983)). Likewise, consideration of zoning economics now has relevance in religious worship cases in the Second Circuit, but not in religious worship cases in the Sixth Circuit. (*Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983) (cert. denied, 469 U.S. 827 (1984). Accordingly, what zoning code provisions are constitutional in some Circuits are clearly unconstitutional in the other Circuits.

Accordingly, it is respectfully submitted that the Petition for a Writ of Certiorari be granted for this reason alone.

POINT II. THE SECOND CIRCUIT HAS ADOPTED THE MINORITY POSITION IN EMPLOYMENT DIV. v. SMITH, 494 U.S. 872 (1990)

As even Respondents note, the Village of Airmont zoning code is facially neutral. (Respondents Brief, p. 13). Places of worship are permitted in *any* residential district provided sufficient lot size exists. If insufficient lot size exists, anyone wishing to establish a place of worship in the Village has under existing law a preferred use obtainable by simple variance application. (*Cornell University v. Bagnardi*, 68 N.Y.2d 583, 510 N.Y.S.2d 861 (1986)). Still, the Village's facially neutral zoning enactment has been declared unconstitutional by the Second Circuit. Without any coyness, the Second Circuit has effectively overruled the Supreme Court's Decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990). In other words, the Second Circuit has embraced a judicially mandated affirmative action policy in freedom of religion cases. A municipality such as this Village exercising its zoning powers is no longer permitted just to give equal treatment to different religious practices. Instead, affirmative action is required to accommodate the particular needs of every religious group. Thus, the Village of Airmont is being required to affirmatively accommodate the needs of Orthodox Jewish residents who are economically challenged in building a traditional place of worship on a two acre lot.

This affirmative action to accommodate is masked under the guise of "substantively neutrality" embraced by Justice Souter in his concurring opinion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, ____ U.S. ____, 113 S.Ct. 2217, 2242 (1993). Moreover, even Respondents admit that Justice Souter's concurring judgment doubts whether the *Smith* rule merits adherence. (Respondent's Brief, p. 13). And, Respondents also concede that Justices Blackmum and O'Connor expressed their position that *Smith* was wrongly decided. (*Id.*).

Accordingly, this determination by the Second Circuit conflicts and contradicts existing law as articulated by the United States Supreme Court in *Employment Div. v. Smith*, 494 U.S. 872 (1990). Movcover, the Second Circuit determination also rejects a prior Supreme Court consideration of this very issue regarding affirmative action for religious worship restricted by only economic considerations. (*American Communications Assoc. v. Douds*, 339 U.S. 382, 397 (1950). To resolve this conflict, this Petition herein should be granted.

POINT III. STANDING UNDER THE FAIR HOUSING ACT SHOULD BE DECIDED BY THIS COURT

To buttress Respondents claim that standing exists, the mantra that "proven discriminatory intent of Petitioners" exists in this Record is recited. (Respondent's Brief, p. 18). Yet, there is absolutely no evidence of any intent to discriminate by the Village qua Village. Clearly, Respondents leap to this conclusion to disguise the fact that no individual Respondents have claimed any injury by the Village. As even Respondents' Rabbi conceded, "I was not stopped from praying" by the

Village of Airmont. (Tr. 824). Thus, whatever Respondents claim Petitioners did had absolutely no *effect* at all on Respondents' worship activities.

It is from traditional consideration of standing requirements that the Supreme Court recently affirmed such long standing rules in *Adarand Constructors, Inc. v. Penna,* ____ U.S. _____, 115 S.Ct. 2097 (1995). Although standing under the Fair Housing Act has not been specifically addressed by this Court, it is certainly proper to extend the Supreme Court analysis in other cases to determine what persons have standing in Fair Housing Act matters. The very amorphus definition of "aggrieved person" found in 42 U.S.C. Section 3602(i)(2) is devoid of any temporal component or test of immediacy of harm. Thus, determination of this issue alone is necessary both under Article III of the Constitution as well as prudential considerations by this Court.

For Respondents to claim that "threat and the injury to Respondents has been proven to a probability" is totally without support in the Record. (Respondent's Brief, p. 18). This Court needs to and should determine this issue of standing under the Fair Housing Act to provide all litigants across the nation with a fair test to determine who has standing. Petitioners agree with Respondents about "the need for judicial intervention in this case." (Brief for the United States, p. 16). Yet, the judicial intervention needed is by the Supreme Court of the United States herein to grant this Petition. Otherwise, people not even effected by municipal action have a right to sue that municipality.

CONCLUSION

Based upon the foregoing reasons and authorities, it is respectfully submitted that the Petition herein be granted.

DATED: June 20, 1996
Nyack, New York

Respectfully submitted,

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MEMORANDUM DECISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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91 Civ. 2550 (GLG)

RABBI YITZCHOK LEBLANC-STERNBERG, CHANIE LEBLANC-STERNBERG, FRED WALFISH, LEWIS KAMMAN, PARK AVENUE SYNAGOGUE, INC.,

Plaintiffs,

-against-

ROBERT FLETCHER & NICK VERTULLO, RAYMOND KANE, MAUREEN KENDRICK, and JOHN C. LAYNE, Individually and in their capacity as Trustees of the Village of Airmont,

Defendants.

---

91 Civ. 8453 (GLG)

UNITED STATES OF AMERICA,

Plaintiff,

-against-

THE VILLAGE OF AIRMONT, AIRMONT CIVIC ASSOCIATION, RALPH BRACCO, in his capacity as Mayor of the Village of Airmont, JOHN C. LAYNE, RAYMOND KANE, CHARLES CALOTTA and RONALD SABO, in their capacities as Trustees of the Village of Airmont,

Defendants.

Following a reversal of its earlier decisions, *United States v. Village of Airmont*, 839 F. Supp. 1054 (S.D.N.Y. 1993), and *LeBlanc-Sternberg v. Fletcher*, 846 F. Supp. 294 (S.

D.N.Y. 1994), and remand from the Second Circuit Court of Appeals, *LeBlanc-Sternberg v. Fletcher*, 67 F. 3d 412 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3605 (U.S. Feb. 26, 1996)(No. 95-1381), this Court must now comply with the Second Circuit's directives in fashioning appropriate remedies. The parties in these two actions (which were tried and appealed together) differ entirely as to what is expected of this Court at this point. In order to understand the dispute, it is necessary to review the history of the litigation in some detail.

HISTORY OF THE LITIGATION

The Town of Ramapo ("Ramapo" or the "Town") in Rockland County, New York, is a large geographical area composed of a number of incorporated villages and unincorporated areas. It has a substantial Orthodox Jewish population, consisting primarily of Hasidic Jews.

In recent years, the tendency of villages to incorporate for purposes of asserting local government control has increased substantially. Indeed, twelve villages have broken away from the Town of Ramapo.[1]

In the Airmont area of the Town, a group calling themselves the Airmont Civic Association ('ACA" or the "Association"), a not-for-profit association, was formed to seek the incorporation of a village ("Airmont" or the "Village"). Although the first president of the Association and a number of its leaders were Jewish, they were not Orthodox, and the Association admittedly sought incorporation of the Village of

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[1] A couple of the villages were formed by Orthodox Jewish groups for the admitted purpose of creating Hasidic enclaves so that the village residents could comply with Orthodox Jewish law. The United States government saw no unfair housing problems with respect to the formation of those villages.

Airmont because some of its members felt that the Town of Ramapo was adopting zoning measures unduly favorable to Hasidic Jews. Their initial concern was multiple-family housing in areas zoned for single family residences. Another aspect, and a focus of later ACA concern, was the allowance of home synagogues ("shteebles") in residential areas through a liberal interpretation of the Town's Home Professional Office zoning law. Through that provision, groups of up to 49 persons were allowed to attend services in a home in a residential area provided that the portion of the home used for that purpose did not exceed half the dimensions of the ground floor and provided that only two employees were involved.

In early 1989, a referendum on incorporating the Village of Airmont was held, which passed by a three-to-one margin. The operation of the Village was, however, delayed for two years due to litigation commenced by Orthodox groups and real estate interests. The Village was finally incorporated in April 1992. Two days later, before the Village had actually commenced operation, an Orthodox Jewish Rabbi, Yitzchok LeBlanc-Sternberg (who is Hasidic), and members of his congregation instituted a private suit claiming that the formation of the Village violated their First Amendment rights and the Fair Housing Act. 42 U.S.C. § 3601 *et seq.* The action principally sought large monetary damages and the dissolution of the Village.[2] The following month Village elections were held, and the slate of candidates supported by the ACA was elected as Mayor and Trustees. (By that point in time, however, the ACA was disbanding and, when sued in this action, defaulted). Upon incorporation, the Village did not adopt a new zoning code but continued operating for a period of time under the Ramapo code. As discussed below, it was not until 1993 that the Village adopted a zoning code.

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[2] They sought preliminarily to enjoin the election of Village officials but this was denied by the Court because they had not made a showing of irreparable harm. *See LeBlanc-Sternberg v. Fletcher*, 763 F. Supp. 1246, 1252 (1991).

Prior to the Village's incorporation and the commencement of the litigation, the LeBlanc-Sternberg congregation, which was located in the Airmont section of Ramapo, had already received zoning permission from Ramapo to operate a home synagogue as a "Home Professional Office" under the Ramapo interpretation.[3] The LeBlanc-Sternberg congregation has continuously operated their home synagogue for the last six and one-half years.

In late 1991, the United States commenced a separate action under the Fair Housing Act against the Village and its then Trustees, alleging that the Village had been incorporated for purposes of excluding Orthodox Jews through zoning restrictions on their places of worship. The government sought a declaratory judgment and injunctive relief against further violations. The private action and the government action were consolidated for discovery and eventually trial. The defendants demanded a jury trial on the private action damage claims, but the government's action, including claims for injunctive relief, was tried to the Court. When the actions were tried, the government's case involved factually not only the LeBlanc-Sternberg congregation but also another congregation headed by a Rabbi Chaim Friedman.[4]

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[3] While there were legal challenges to that zoning grant they were not pursued after the incorporation.

[4] Rabbi Friedman's congregation had also commenced a separate lawsuit looking for damages of its own. That action remains pending before a different Judge in the Southern District of New York.

During the first year and a half of the pendency of these actions, there was no zoning activity concerning home synagogues. In January of 1993, however, more than a year and a half after the private action was commenced, Airmont adopted its own zoning code, which was approved at a public meeting without objection. The new code modified the Ramapo zoning provision regarding Home Professional Offices. It kept the same restrictions concerning use of no more than half of the ground floor and no more than two employees but added language indicating that the Home Professional Office should not generate activities inconsistent with a residential area. The change in the zoning code did not result in any amended pleading being filed in either action or any request for temporary injunctive relief being made. Since the date of its passage, the provision of the amended zoning code concerning Home Professional Offices has never been applied or interpreted.

The consolidated cases went to trial in October of 1993. The trial lasted seven weeks. The jury deliberations lasted for a full week -- the longest that this Judge has ever seen for a civil case. The private action was submitted to the jury on a special verdict from containing a number of interrogatories. Eventually the jury returned the verdict form answering most questions in favor of the defendants. It found for all the individual defendants awarding no damages against any of them. It determined that the majority of voters who favored

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That congregation was attempting to build a free-standing synagogue, which did not fall under the home professional office exception. Although Friedman's application to build the synagogue was eventually approved by the Town Planning Board, the congregation had problems with finances and safety aspects of the State's building code. In the interim, it has functioned in the Rabbi's home as a Home Professional Office.

incorporation were not motivated even in part by discrimination against Orthodox or Hasidic Jews. It did find, however, that the Village had violated the private plaintiffs' fair housing rights and had conspired to violate their rights to the free exercise of religion of free speech. Despite these findings, the jury did not award any damages against the Village, not even nominal damages. In the view of the only Judge present during these lenthy proceedings, this was a compromise verdict and, to an extent, an inconsistent one. This Court then decided the government's action in favor of the Village and its Trustees, finding essentially that, while some bias against the Orthodox Jews existed among Village officials, the Village had done nothing to interfere with their religious practices or fair housing rights. Consistent with that, we reversed that portion of the jury's verdict that had found against the Village. Both plaintiffs then appealed.

THE COURT OF APPEALS DECISION

The Court of Appeals first reversed this Court's entry of judgment on behalf of the Village in the private plaintiffs' case. In a lengthy opinion it noted that the defendants had demanded a jury trial on the damage aspects and held that, if a claim for damages is joined with an equitable claim, the right to a jury trial on all issues common to both claims prevails. *LeBlanc-Sternberg, supra*, 67 F.3d at 426.

With respect to the apparent inconsistency of the verdicts, it held that it was the duty of the District Court to harmonize the jury's responses by seeking an explanation supportable by the record to correct the apparent inconsistency. *Id.*at 427. The appellate panel divined that the jury "may have been persuaded that the violative act [of the Fair Housing Act] was the enactment of the Airmont zoning code," *id*. At 428, and that suit was a "fair inference" that the jury viewed this as an act designed to limit home synagogues, thus make housing unavailable to Orthodox Jews.[5] *Id.* It, therefore, found the jyry's verdict consistent "with fully supportable findings," *id.* At 429, which were reasonable, and it required the District Court to accord the jury's verdict such an interpretation.[6] *Id.* It chastised that trial court for making findings of fact, for weighing the evidence, and for not following findings that were "implicit" in the jury's verdict.[7] *Id.* At 430.

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[5] Since a Village is an inanimate body which cannot do anything without human action, the Court of Appeals had to explain why the individual defendants who had passed the zoning change were not personally liable. The opinion resolves this by noting that the jury was charged, in answer to its specific question, that the Trustees had legislative immunity with respect to their official acts in voting legislation. *Id.* at 428. As to whom the Village was conspiring with, since it could not conspire with itself or its own officials, the Circuit Court concluded that it was "easily inferable" that it had conspired with the Airmont Civic Association. *Id.* However, the ACA had gone out of existence and ceased activities before the zoning code was amended. Indeed, it had been the subject of a default judgment a year earlier.

[6] The jury, having found for the individual defendants and not having awarded any damages, it would seem that we were dealing solely with injunctive relief, which is always a matter exclusively.

[7] With respect to factual findings, we note that the appellate decision found that numerous outrageous anti-Orthodox statements were made by various of the individual defendants. While there was evidence of denials by the various defendants of having made such statements, in some instances supported by tape recordings of the hearings in question. Moreover, while the decision recites minutes concerning "a grim picture of a Hasidic belt from Rockland through Orange & Sullivan Countys, "*id.* at 418, the minutes were reporting statements made to the group by the Jewish Superintendent of Ramapo

The lengthy decision then cites all of the evidence it could muster from the trial record to support its factual findings. It concluded that, taking the evidence in the light most favorable to the private plaintiffs, "there was ample support for the jury's implicit finding that Airmont's zoning code would be interpreted to restrict those of home synagogues, that the motivation behind the enactment was discriminatory animus toward Orthodox and Hasidic Jews, and the Airmont pursued this goal jointy with ACA."[8] Id.at 431. The opinion further held that plaintiffs were entitled to nominal damages because it was "plain error" for the trial court to instruct the jury that it "may award" such damages, rather than that it must do so, citing Gibeau v. Nellis, 18 F.3d 107, 110-11 (2d Cir. 1994).[9] Id. With respect to injunctive relief, it held that on remand the Court should consider "whether injunctive relief may also be appropriate." Id. at 432. The court did uphold the verdict on behalf of the five individual defendants finding that the plaintiffs had received a fair trial in their favor. Id. at 433. With respect to the government's action, which under this Court's decision had resulted in a complete victory for the defendants, it held that the government can get the benefit of non-mutual offensive collateral estoppel, although it could not have been imposed against the government. Id. at 434. Consequently, having

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who had been named as a defendant int he private action, but had been dismissed on motion by this Court.

[8] See footnote 5, *supra*, concerning the status of the ACA at this point in time.

[9] The appellate decision did not bother noting that this "plain error" derived from a case that was not decided by the Court of Appeals until months after the trial of this action.

made findings resulting in a jury verdict against the Village in the private action, it held that this Court could not properly make findings that contradicted what the appellate decision said the jury had intended. [10] Id. The net effect was that by appellate alchemy the government's total loss was converted into a complete victory. The government's action was remanded for injunctive relief and the fashioning of appropriate equitable remedies applying Fair Housing Act principles. Id. at 435.

INJUNCTIVE RELIEF

The Defendant Village's Position

The Village opposes granting any injunction relief. It notes that the zoning code on which the Court of Appeals focused did not come into existence until long after these lawsuits had been filed. The Village argues that there has never been an application by the Orthodox Jews (or anyone else, for that matter) for additional places of worship in the Village, nor has there been a request for interpretations of the zoning code. Consequently, it contends that there has been no demonstration of discriminatory impact, direct or indirect, by the zoning code, either as written or as applied. The Village notes that the private plaintiffs conceded at trial that the Village had not interfered with their worship services.[11] Consequently, it asserts that the plaintiffs have not met their burden of showing any real or immediate threats that they will be wronged, citing *City of Los Angeles V. Lyons*, 461 U.S. 95, 111 (1983), nor have they demonstrated any indication of real and imminent harm. *Carey V. Klutznick*, 637 F. 2d. 834 (2d Cir. 1980); *O'Shea V. Littleto*, 414 U.S. 488 (1974).

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[10] This Court's decision had made extensive factual findings. *See United States v. Village of Airmont,* 839 F. Supp. 1053 (S.N.D.Y. 1993). The appellate decision did not dispute any of these specific findings but instead superimposed its view of the jury's findings so as to render them immaterial.

[11] However, some individuals did make such attempts, albeit unsuccessfully, by monitoring the number of persons attending

The Court Of Appeals Holding

There is considerable substance to the Villlage's argument. However, it has one fault--it is contrary to the emphatic directions of the Court of Appeals that injunctive relief must be granted to avoid discrimination in a manner "found to be predictable from the evidence in this record," *LeBlanc-Sternberg, supra,* 67 F. 3d at 434, and that "on a practice that ...is about to occur" the Court is authorized to grant injuntive relief. *Id.* at 425. With respect to the claims brought under the Fair Housing Act, we are directed to enter such injunctive relief "as is necessary to assure full employment of the rights granted by (the Act)." [12]
Id. at 434.

The Government's Request for Injunctive Relief

The Court of Appeals decision authorizes relief to parties who "will be injured by a discriminatory housing practice that is about to occur," citing 42 U.S.C. s 3601(i). *Id.* at 425. In light

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services.

[12] No citation of authorities for this proposition-- *i.e.* where no action has been taken or is imminently threatened -- is set forth by the Court of Appeals, other than the language of the Act itself.

of the Court's interperation of the jury's verdict, as applied in the governments case, the government has understandably focused its request for injunctive relief on the zoning code. However, rather than requesting prohibitory injunctive relief against illegal or unconstituional applications of the code, the government has sought to redraft the zoning code in an affirmative manner. In its memorandum in support of its request, the government argues that "(t) aken together, these changes will help ensure that the Village will permit the use of residences for regular religious worship and that it will otherwise respect the rights of Orthodox and Hasidic Jews to live and pray in Airmont."[13]
Government's Memorandum at 11.

The Village notes that the zoning changes requested by the government would allow a home synagogue to operate in virtually every house and could completely eviscerate its zoning code. That may well be. The Second Circuit opinion appears incompatible with the decision of the Eleventh Circuit in *Grosz*

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[13] The government's changes in the zoning code are obviously intended to assist only Orthodox Jews and not other smaller religions that conduct home services, which is a questionable favoring of one religion. However, that conforms to the Court of Appeals' conclusion that the need for home places of worship is "unique to the Orthodox and Hasidic Jews ." *Id.* at 430-31. (The Court of Appeals reached this conclusion on the debatable basis that Orthodox and Hasidic Jews were the only ones who had applied to conduct services under Ramapo's home professional office provisions.) There was, however, evidence at trial of other small non-Jewish religious groups which held home services.

V. City of Miami Beach, Florida, 721 F.2d 729, 741 (1983), cert. *denied*, 469 U.S. 827 (1984), and the decision of the Sixth Circuit in *Lakewood, Ohio Congregation of Jehova's Witnesses, Inc. V. City of Lakewood, Ohio*, 699 f2d. 303, *cert. denied*, 464 U.S. 815 (1983). In addition, it would appear to contradict an earlier decision in this District which also concerned Ramapo. *Congregation Beth Yitzchok of Rockland, Inc. V. Town of Ramapo*, 593 F. Supp. 655 (S.D.N.Y. 1984). However, while we may disagree with the ruling of the Circuit Court, we are compelled to follow its directions.

Since the Village has done nothing except pass a zoning code which has never enforced or interpreted, and there are no actions to overturn, it would seem that there is no other way of satisfying the remand directions except by revising the existing zoning code.[14] Consequently, we accept in general the government's approach to amending the zoning code as being the only practical way of complying with the remand order.[15]

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[14] Any attempt to enforce the code in violation of the Fair Housing Act or constitutional rights would, of course, be illegal even without injunctive relief. However, as the government argues, a preventive injunction can be enforced by contempt sanctions without the necessity of instituting new litigation.

[15] We do this despite the Supreme Court's teaching in *Rizzo v. Goode*, 423 U.S. 362 (1976), that, in light of considerations of federalism, "(w)here.....the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administartion of its own law.' " *Id.* at 378, *citing Stefanelli V. Minard*, 342 U.S. 117, 120 (1951). We also ignore the more recent Supreme Court directive that equitable relief must be remedial in nature, *i.e* it must be designed to restore as nearly as possible the victims of discriminatory conduct to the position they

We will, therefore, in a separate order and judgment, enjoin the Village and its officers, employees, agents, successors, and assigns from promoting religious discrimination; from denying equal opportunity to religion by use, interpertation, or enforcment of the zoning code in such a manner that it prevents home worship; from discrimination because of religion or interfering with the free exercise of religion in connection with housing; and from taking any action that limits the availability of housing on the basis of religion. Specifically, we will direct a revision of the zoning code so that it will prevent persons from walking to and from religious services at such palces of worship, or to prevent home worship services on any day in all residential zones. In addition, the phrase "place of worship" will be replaced with "free-standing place of worship" throughout the zoning code and will be redefined so as to allow a portion of the building to be dedicated as living quarters for clergy and their families; and the phrase "neighborhood place of worship" will be added and will refer to larger structures used exclusively for the conducting of organized religious services,

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would have occupied in the abscence of such conduct. *Missouri V. Jenkins*, ---U.S.---, 115 S. Ct. 2038 (1995). We do not see the relief requested as improving in any way the rights already exercised by the Orthodox in Airmont. The relief simply is insurance that there can be no challanges to their exercise of religion in their homes in the future.

which will be permitted in all residential zones. In addition, as requested we will order that the last two sentences of the definition of "Home Professional Office" be deleted.[16] The government also requests that the Village be directed to retain applications for residential homes of worship for five years. In light of the changes made in the zoning code, we do not foresee the need for zoning applications. The government also requests that for five years the Village notify the government of any zoning and planning applications which relate to religious worship or changes in the zoning relating to religion. While we deem it highly unlikely, under the circumstances, that the Village would entertain anything relating to religion under the zoning laws, we see no harm in including that in the relief granted.

Private Plaintiffs' Requests

The private plaintiffs' main request for injunctive relief is a major one: they seek the dissolution of the Village. They argue that they have proved that the defendants have engaged in a pattern of practice of discrimination and that discriminatory intent was at the root of the incorporation of the Villlage and consequently, they maintain, they are entitled to this remedy.

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[16] We do not wish to imply that we have any agreement whatever with the Ramapo approach to home places of worship. While constructing these as professional offices might have been a satisfactory political solution to a difficult question, it is intellectually dishonest to catagorize services involving up to fifty people as being an activity of a home professional office such as might be conducted by a doctor, lawyer or religious leader who simply consulted with a couple of members of his congregation

There are several fallacies to this argument. In the first place, there has been no finding of religious discrimination with respect to the incorporation of the Village of Airmont. Indeed, the jury found that the majority of voters who supported the incorporation of the Village were not involved in religious discrimination. Moreover, the appelate decision remanding the action focuses upon the change in the zoning code as to which no action has ever been taken. There is nothing in the Court of Appeals' decision even remotely suggesting that the Village must be dissolved. The Second Circuit has held, in *Dean V. Coughlin*, 804 F.2d. 207, 213 (1986), that we should not use a sledgehammer where a more delicate instrument will suffice. We believe that the relief requested by the government and granted by this Court adequately meets the Second Circuit's concerns expressed in their decision.

Another problem with the private plaintiffs' request is that it has no support in either the statute or case law. The private plaintiffs rely on *Gomillion V. Lightfoot*, 364 U.S. 339 (1960). The case was virtually the converse of the present situation. The state legislature in Alabama had revised the boundaries of the City of Tuskegee so as to eliminate the famous black residents of the City. The Supreme Court reversed this action, finding that it was contrary to the Fifteenth Amendment by depriving blacks of their right to vote on account of their race.

Curiously, the private plaintiffs ask, alternatively, for relief similar to what the Supreme Court condemned in *Gomillion*. They seek a plan to redistrict the Orthodox "who reside in some localized area of Airmont" back into the Town of Ramapo. We doubt that we could adequately ascertain what the localized area would be. (The six -lane New York Thruway forms a natural boundary between Ramapo and Airmont.) Moreover, the Orhtodox population in Airmont has *increased* since the formation of the Village. That relief also seems both contrary to the directions of the Court of Appeals and of doubtful legality in its own right. The Supreme Court recently ruled that the government may not establish boundaries according to religion. *Board of Education of Kiryas Joel Village School District V. Grumet,*____U.S.____, 114 S. Ct. 2481 (1994). As the Second Circuit has held, the purpose of the Fair Housing Act is to promote integration, not to encourage segregation.*Otero v. New York City Housing Authority,* 484 F. 2d. 1122 (1973). Finally, the local government law of New York has provisions for alteration of municipality lines, incorporation or unincorporation of local villages. To the extent that a discreet area of Airmont could be described, we know of no inhibition on that area's holding referendum to remove itself from the Village of Airmont.

The private plaintiffs also request relief similar to that requested by the government. (Indeed they join in all of the government's requests.) The remand instructed this Court that it "should consider...whether injunctive relief may also be appropriate." *LeBlanc- Steinberg*, 67 F. 3d. at 432. While we question whether the private plaintiffs, whose rights have long been vested, require any injunctive relief at all, that which has been granted in the government's action will more than suffice. We believe that, to the extent that their requests are justified, they have been adequetly encompassed by granting the governments's requests.[17]

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[17] At times in dealing with the private plaintiffs' action in its opinion, the Second Circuit acts as if it were pursuing a class action. They were not. They were seeking money damages and abolition of the Village on their own. Another Orthodox group, as mentioned above,

DECLARATORY JUDGMENT AND NORMAL DAMAGES

While the Village disputes the need for declaratory relief, the Court of Appeals remanded the action for a declaration that the Village violated the Fair Housing Act. Consequently, we have no alternative except to so declare. The action was also remanded for purposes of granting nominal damages to the private plaintiffs. The remand does not indicate in what amount the nominal damages should be, but the traditional amount has been $1.00. Consequently, we award each of the private plaintiffs nominal damages in the amount of $1.00.

ATTORNEYS' FEES

The remand decision in this case did not mention attorneys' fees. The private plaintiffs, however, request the Court to set a schedule for them to make an application for attorneys' fees as the prevailing parties in this action. We question whether the private plaintiffs are truly *the* prevailing party in the private action. The lost to the five individual defendants who are clearly prevailing parties. Moreover, to the extent that the private plaintiffs are the prevailing party against the Village, they have not prevailed on their major goals of recovering substantial monetary damages and having the Village dissolved. While the Supreme Court and the Second Circuit have been taking dramatically different approaches to the need for attorneys' fees to be proportionate to the success obtained, the Supreme Court has held that a plaintiff who obtains only nominal damages when suing for a much larger sum is usually

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has pending its own seperate action.

not entitled to attorneys' fees, even though he technically qualifies as a prevailing party. *Farrar v. Hobby,* 506 U.S. 103 (1992); *but see Cabrera v. Jakabovitz,* 23 F. 3d 372, 292 (2d Cir.), *cert. denied,* 115 S. Ct. 205 (1994).

There is a practical reason for not awarding the private plaintiffs attorneys' fees here. Two of the prevailing defendants have an application pending for attorneys' fees.[18] If we direct the Village to pay attorneys' fees of the plaintiffs and the plaintiffs to pay the attorneys' fees of the two individual defendants, what we have will amount to directing the Village to pay the attorneys' fees of the individual defendants.[19]

We do not, however, rule on this matter at this time since no application for attorneys' fees as such has been made, rather a request that we set up a "schedule." The private plaintiffs' counsel are free to make any application which is timely, under the rules and the case law. The issue will be decided at that time.

SO ORDERED

Dated: April 25, 1996
While Plains, N.Y.

S/
Gerard L. Goettel
U.S.D.J.

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[18] This application was argued some time ago. However, after the appeal was filed and the appellate panel selected, this Court thought it prudent not to act upon their application at that time.

[19] This, in fact, is a relief which two of the individual defendants, who were separately represented in this action, sought to obtain in the first place.